TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~366~~ 163

WILLIAM CREEVY; WILLIAM CREEVY, THEO. NICKERSON AND CHARLES FOX, AS CREEVY, NICKERSON & CO., AND DAVID McCOARD, APPELLANTS,

vs.

THE ECLIPSE TOW-BOAT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED DECEMBER 9, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 366.

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1 United States circuit court, fifth circuit and district of Louisiana.

THE ECLIPSE TOW-BOAT COMPANY
vs.
STEAMSHIP MERRIMAC, TOW-BOAT CALHOUN, and Tow-boat Harry Wright. } No. 5568.

Appeal from U. S. district court.

PROCEEDINGS BEFORE THE U. S. DISTRICT COURT.

United States district court, district of Louisiana.

THE ECLIPSE TOW-BOAT COMPANY
vs.
THE STEAMSHIP MERRIMAC, THE STEAM TOW-boat Calhoun, and the Steam Tow-boat Harry Wright, their tackle, apparel, &c. } No. 8687.

Libel for collision.—Filed January 19th, 1867.

In admiralty.

To the judge of the district court of the United States for the district of Louisiana:

2 The Eclipse Tow-boat Company, a corporation enacted and formed under the laws of Louisiana, and doing business in the city of New Orleans, in the towing of vessels to and from the port of New Orleans, and to and from the seas adjacent thereto, owners of the steam tug-boat Gladiator, hereinafter mentioned, exhibit this their libel against the steamship Merrimac, and against the steam tow-boat Calhoun, and against the steam tow-boat Harry Wright, all three now lying in the port of New Orleans, in the district of Louisiana aforesaid, and within the admiralty and maritime jurisdiction of this honorable court, and against the engines, machinery, boats, tackle, apparel, and furniture of all and singular the said three vessels, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime; and thereupon the said Eclipse Tow-boat Company doth allege and articulately propound as follows, to wit:

3 First. That the said steam tug-boat Gladiator is a vessel of the burthen of one hundred and one tons, and at the time when the cause of action hereinafter mentioned and set forth arose, was enrolled and licensed in this collection district, and was employed in the business of towing vessels to and from sea, and upon the waters of the river Mississippi, and the waters adjacent thereto.

Second. That, on the eleventh day of January, 1867, between the hours of one and two in the afternoon, the aforesaid steam tug-boat Gladiator, being tight, staunch, and well manned and provided, was lying on the bar of the Southwest Pass of the river Mississippi, made fast side and side by proper ropes, to the ship Celuta, on the larboard side of the said ship, (the steam tug-boat Switzerland being fast to the said ship on her starboard side,) and with the engines of the Gladiator, as well as those of the Switzerland, at work endeavoring to get the said ship Celuta over the bar on which she was then and had been for twelve hours before grounded, said ship being bound inward, or from sea to the port

4 of New Orleans; that the said three vessels, the Celuta, the Gladiator and the Switzerland, thus lying side by side on the bar and the Southwest Pass, were at a distance of seventy to seventy-five feet to the eastward of a certain wreck upon the said bar, the Gladiator being nearest to said wreck, and her port or larboard side being at the distance aforesaid therefrom; that while in said position, and the Gladiator stationary upon the water, although with engines working, three vessels lashed or fastened abreast, namely: the steamship Merrimac, of the burthen of about two thousand tons, with the steam tow-boat Calhoun, of about five hundred tons burthen, on her starboard side, and the steam tow-boat Harry Wright, of about five hundred tons burthen, on her port or larboard side, approached the said bar of the Southwest Pass, bound inward or from sea towards New Orleans, and the said three vessels being all under a full head of steam, and under the united im-
5 pulsion of all their engines and steam power, attempted to cross the said bar between the said steam tug-boat Gladiator, and the said "wreck;" that there was not room in the intervening space for the said vessels to pass, inasmuch as the width of the Merrimac, Calhoun, and Harry Wright, united, considerably exceeds one hundred feet; that in thus attempting to pass the Gladiator and keeping clear of the "wreck" on their larboard hand, the said three vessels bore down with all their united weight and impetus upon the steam-tug Gladiator, the blow being given by the steam tow-boat Calhoun, which was the nearest to the Gladiator; the Calhoun having a considerable list to port, her starboard guard was elevated considerably, and passed over the rail of the Gladiator, striking the latter vessel with extreme violence, raking her from stem to stern, and carrying away all her upper works. By the said collision the Gladiator's cabin, cook-house, pilot-house and engine-room were entirely smashed to pieces, and carried from the port side
6 over to the starboard side of the vessel. Her boiler was knocked out of place, her steam drum broken to pieces, her lever and exhaust-pipe broken, and other damage done to the engine. Her railing, stanchions, wire rigging, and chain plates were carried away entirely; several timber knees in the hull of the vessel were broken. In short, the said steam-tug Gladiator was reduced to a complete wreck, and had to be towed to New Orleans for repairs, which she is now undergoing, and which, when completed, will cost, as estimated, about ten thousand dollars inclusive of the loss of her business, and of the earnings of said vessel while repairing.

Third. That the damage aforesaid has been done by the steamship Merrimac and by the steam tow-boat Calhoun and Harry Wright; that the weather was clear, the time near midday, and the Gladiator was distinctly visible to the said vessels, Merrimac, Calhoun, and Harry Wright, previous to the collision aforesaid; that the said three vessels might have avoided the collision, either by crossing the bar to
7 the westward of the "wreck" where there was double the room to pass than there was to the eastward of said "wreck," or by the casting off one or more of the three steam vessels which were towing the Merrimac, or by stopping the headway of the said three vessels and waiting until the channel of the Southwest Pass was clear of the obstruction of the Celuta or other vessels aground upon said bar.

Fourth. That, at the time when the danger of a collision was first perceived on board the Gladiator, it was impossible for her to get out of the way of the three vessels approaching her as aforesaid, nor were there any means to which she could have resorted for that purpose; that the Gladitator was in her proper place at the time, and was en-

gaged in her usual business of towing and assisting a vessel navigating to prosecute her voyage from sea to the port of New Orleans.

Fifth. That libellants were, at the time of said collision, the
8 true and lawful owners of said steam-tug Gladiator, and that by reason of the careless, negligent, unskillful, and improper management of the steamship Merrimac, the steam tow-boat Calhoun, and the steam tow-boat Harry Wright, and of the collision thereby occasioned, as aforesaid, libellants have suffered damages to the amount of ten thousand dollars and upwards, for which they claim reparation in this suit.

Sixth. That all, and singular, the premises are true and are within the admiralty and maritime jurisdiction of this honorable court.

Wherefore libellants pray that process, in due form of law, may issue against the said steamship Merrimac, and against the said steam tow-boat Calhoun and Harry Wright, and their engines, machinery, boats, tackle, apparel, and furniture, and that this honorable court will pronounce for the damages aforesaid, with interest from judicial demand, and decree the same to be paid with costs, and for such other relief and redress as to right and justice may appertain, and this court is
9 competent to grant in the premises.

(Signed) BUCHANAN & GILMORE,
Proctors.

(Signed) JOSEPH LEACH,
Act'g Pres't E. T. B. Co.

Personally appeared on this 19th January, 1867, Joseph Leach, acting president of the Eclipse Tow-boat Company, and makes oath to the truth of the foregoing libel.

(Signed) JOSEPH LEACH.

Sworn to and subscribed before me this 19th January, 1867.

(Signed) K. LOEW,
D'y Clk.

* *Order.*

Reference approved.
D. URBAN, *Clk.*

Let admiralty process issue as prayed for. January 19th, 1867.
(Signed) K. LOEW, *D'y Clk.**

Admiralty warrant.—Issued January 19th, 1867.

The President of the United States of America to the marshal of the district of Louisiana or to his lawful deputy, greeting:

You are hereby commanded forthwith to seize and into your possession take the steamship Merrimac, the steam tow-boat Calhoun, and the steam tow-boat Harry Wright, their tackles, &c., now libelled
10 by the Eclipse Tow-boat Company for the causes set forth in the libel now pending in the district court of the United States for the district of Louisiana; that you do cite and admonish the owners or owners, *of* all and every other person or persons having, or pretending to have, any right, title, or interest in or to the same, to be and appear before a

district court of the United States for the district aforesaid, to be holden at the city of New Orleans, on or before the third Monday from the service hereof, to show cause, if any they have or can, why the said three steamers, their tackles, &c., should not be condemned and sold agreeably to the prayer of the libellant. And how you have executed this warrant that you make return according to law.

Witness the Honorable Edward H. Durell, judge of the said court at New Orleans, this 19th day of January, 1867, and the 91st year of the independence of the United States.

[SEAL.] (Signed) K. LOEW,
D'y Clerk.

11 *Marshal's return.*

Received January 19th, 1867, and on the same day, month, and year, seized and took into my possession the steamship Merrimac, her tackles, apparel, &c., served warrant, libel, and order on J. P. Sullivan, esq., attorney for claimants of said boat, on the 21st January; and on the 21st day of said month and year I seized and took into my possession the steam tow-boat Calhoun, her tackle, &c., served warrant, libel, and order on Tho's Bohn, wheelsman, being the only officer on board at that time of said seizure; and on the 24th day of same month and year I seized and took into my possession the tow-boat "Harry Wright," her tackle, &c., and served a copy of the warrant, the libel, and order on the captain of said boat, on board, same day; and published monition in N. O. Times, a daily paper printed and published in this city, on the 25th, 31st January and 6th, 11th February, 1867.

New Orleans, February 11th, 1867.

(Signed) J. J. PREIS,
D'y U. S. Marshal.

12 *Monition.*

THE ECLIPSE TOW-BOAT COMPANY
vs.
THE STEAMSHIP MERRIMAC, THE STEAM TOW-boat Calhoun, and Steam Tow-boat Harry Wright, &c.

In the United States district court for the district of Louisiana. No. 8687.

In obedience to an admiralty warrant to me directed in the above-entitled suit, I have seized and taken into my possession the Steamship Merrimac, the Steam Tow-boat Calhoun, and the Steam Tow-boat Harry Wright, together with their engines, tackle, apparel, and furniture, now libelled by the Eclipse Tow-boat Company for the causes set forth in the libel now pending in the district court of the United States, and I do hereby cite and admonish the owner or owners thereof, and all and every person or persons having or pretending to have any right, title, or interest, in or to the same, to be and appear at a district court of the United States for the district aforesaid, to be holden
13 at the city of New Orleans on or before the third Monday from the date hereof, to show cause, if any they have or can, why the said steamship and steam tow-boats, &c., should not be condemned and sold agreeably to the prayer of the libellant.

The United States marshal's office, New Orleans, twenty-fourth day of January, 1867.

(Signed) J. H. McKEE,
U. S. Marshal.

Agreement to bond.—Filed January 19th, 1867.

THE ECLIPSE TOW-BOAT CO.
vs.
THE STEAMSHIP MERRIMAC, STEAM TOW-BOAT Calhoun, and Steam Tow-boat Harry Wright, their tackle, &c.

In the district court of the United States for the district of Louisiana.

In this case it is agreed that the Steamship Merrimac seized herein be released from seizure on a bond being furnished with satisfactory security in the sum of fifteen thousand dollars, conditioned to an-
14 swer the decree herein to be rendered against the said Merrimac in this court or on appeal, and in all other respects according to law.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Proctors for Claimants.
(Signed) BUCHANAN & GILMORE,
Proctors for Libellants.

Bond for the release of the Merrimac.

UNITED STATES OF AMERICA,
District of Louisiana:

Know all men by these presents that we, The New York Mail S. S. Company, by W'm Creevy, our agent, claimants and owners of the steamship Merrimac, as principal, and David McCoard and Creevy, Nickerson & Co., as sureties, are held and firmly bound unto The Eclipse Tow-boat Company, libellants, in the sum of fifteen thousand dollars, lawful money of the United States of America, for the payment whereof to the said libellants, heirs, executors, administrators, or assigns, we jointly and severally bind ourselves, our heirs, executors, and administrators firmly by these presents.

Witness our respective names and seals hereunto affixed by us
15 at New Orleans, this 19th day of January, one thousand eight hundred and sixty-seven.

Whereas an admiralty warrant was lately issued out of the honorable the district court of the United States of America for the district of Louisiana, at the suit of The Eclipse Towboat Company vs. S. S. Merrimack and 2 other vessels, the Calhoun and the Harry Wright, their tackle, apparel, and furniture, and numbered 8687 on the docket of said court, commanding the marshal to seize and take into his possession the said S. S. Merrimac, the Calhoun, and H. Wright, which have been seized accordingly, but from which seizure the Merrimac has been released and delivered to W'm Creevy, the agent for the claimants and owners thereof, by reason of the signing, sealing, and delivery of these presents, said claimants having obtained the libellant's consent to bond said property, which is now of record in the clerk's office of this court:

Now, the condition of the above obligation is such, that if the
16 said claimant and sureties abide by all the orders, interlocutory

or final, of the court, and pay the said libellants the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court, then the foregoing obligation is to be void; but otherwise shall remain in full force and virtue.

(Signed) NEW YORK MAIL S. SHIP CO., [L. S.]
By WILLIAM CREEVY, *Agent.*
(Signed) CREEVY, NICKERSON & CO. [L. S.]
" DAVID McCOARD. [L. S.]

Signed 22d January, 1867.

Signed, sealed, and delivered in the presence of—
(Signed) K. LOEW,
D'y Clk, and
Messrs. BUCHANAN & GILMORE,
Proctors for Libellants, who consented thereto.

Writ of release.—Issued January 19th, 1867.

UNITED STATES DISTRICT COURT,
District of Louisiana, ss:
NEW ORLEANS, CLERK'S OFFICE.

17 THE ECLIPSE TOW-BOAT COMPANY *vs.* STEAMSHIP MERRIMAC, STEAM TOW-BOAT Calhoun, and Tow-boat Harry Wright. } No. 8687.

The President of the United States of America to the marshal of the district of Louisiana or his lawful deputy, greeting:

Whereas the N. Y. M. S. S. Co., owners of the S. S. Merrimac hath this day filed a claim thereto on behalf of themselves, and further in pursuance to the agreement on file, and which said claim is now of record in this office:

You are hereby authorised to release the said S. S. Merrimac from seizure, and her to restore to the possession and custody of said claimant', they having given bond conditioned as required by law, and otherwise complying with the rules of the court, &c., and make return hereon of your doings in the premises.

Witness the Honorable Edward H. Durell, judge of said court, at New Orleans, this 19th day of January, 1867, and the 91st year of the independence of the United States.

18 [SEAL.] (Signed) K. LOEW,
D'y Clerk.

Marshal's return.

Received January 19th, 1867, and on the same day, month, and year released the steamship Merrimac, named herein, unto the claimants thereof, by going on board of the said vessel and taking away the marshal's keeper from on board, and delivering the said steamship unto the captain thereof in person.

New Orleans, January 19th, 1867.
(Signed) J. J. PREIS,
D'y U. S. Marshal.

Order to execute bond before U. S. commissioner.—Extract from the minutes of 23rd January, 1867.

ECLIPSE TOW-BOAT COMPANY
vs.
ST'M'R MERRIMAC, ST'M'R CALHOUN, AND Harry Wright. } No. 8687.

Ordered, that the bond to be furnished for the release of the steamer Calhoun be executed before Charles Claiborne, esq., U. S. comm'r.

19 *Consent to bond.—Filed January 23d, 1867.*

United States district court, district of Louisiana.

ECLIPSE TOW-BOAT COMPANY
vs.
TOW-BOAT CALHOUN AND OTHER BOATS. } No. 8687.

To the United States marshal, district of La.:

We hereby consent that the tow-boat Calhoun, seized in the above suit, may be released upon a bond in the sum of fifteen thousand dollars, with good and solvent securities, conditioned according to law.

(Signed) H. D. STONE,
Attorney to Claimants and Calhoun.

(Signed) BUCHANAN AND GILMORE,
Proctors for Libellants

Bond for the release of the Calhoun.—Filed January 23d, 1867.

UNITED STATES OF AMERICA,
District of Louisiana:

20 Know all men by these presents that we, the owners of the tow-boat Calhoun, by H. D. Stone, their attorney, claimants and owners of the steam tow-boat Calhoun, as principals, and Th's H. Barker and Spencer Field, as sureties, are held and firmly bound unto the libellants in the sum of fifteen thousand dollars, lawful money of the United States of America; for the payment whereof to the said libellants, their heirs, executors, administrators, or assigns, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents. Witness our respective names and seals hereunto affixed by us at New Orleans, this 23d day of January, one thousand eight hundred and sixty-seven.

Whereas an admiralty warrant was lately issued out of the honorable the district court of the United States of America for the district of Louisiana, at the suit of the Eclipse Tow-boat Co. vs. Steamer Merrimac, Calhoun, and H. Wright, her tackle, apparel, and furniture, and numbered 8687 on the docket of said court, commanding the marshal to seize and take into his possession the said vessels which have been
21 seized accordingly, but from which seizure the st'm'r Calhoun has been released and delivered to the claimants thereof by reason of the signing, sealing, and delivery of these presents, said claimants having obtained leave to bond said property, and filed a claim thereto, which is now of record in the clerk's office of this court:

Now, the condition of the above obligation is such, that if the said claimants and sureties abide by all the orders, interlocutory or final, of

the court, and pay the said libellants the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court, then the foregoing obligation is to be void; but otherwise shall remain in full force and virtue.

(Signed) TOW-BOAT CALHOUN, [L. S.]
By att'y H. D. STONE.
(Signed) THO'S H. BARKER. [L. S.]
(") SPENCER FIELD. [L. S.]

Signed, sealed, and delivered in the presence of—
(Signed) CHARLES CLAIBORNE.

$7,500.
$7,500.

22 Thomas H. Barker, one of the sureties on the within bond, being first duly sworn, says he resides in this city, and is worth the amount of $7,500 over and above all his debts and liabilities.

(Signed) THO'S H. BARKER.

Sworn to and subscribed before me this 23d January, 1867.
(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

Spencer Field, one of the sureties on the within bond, sworn, says he resides in this city, and is worth the sum of $7,500 over and above all his just debts and liabilities.

(Signed) SPENCER FIELD.

Sworn to and subscribed before me this 23d January, 1867.
(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

Writ of release.—Issued January 23d, 1867.

UNITED STATES DISTRICT COURT,
District of Louisiana, ss:

NEW ORLEANS, CLERK'S OFFICE.

THE ECLIPSE TOW-BOAT COMPANY
vs.
S'SHIP MERRIMAC, STEAM TOW-BOAT CALHOUN, and the Steam Tow-boat Harry
23 Wright. } No. 8687.

The President of the United States of America to the marshal of the district of Louisiana or his lawful deputy, greeting:

Whereas James B. Jackson, master of steam tow-boat Calhoun, hath this day filed a claim thereto on behalf of the owner, A. S. Mansfield, and which said claim is now of record in this office:

You are hereby authorized to release the said steam boat Calhoun from seizure, and her to restore to the possession and custody of said master, he having given bond, conditioned as required by law, and otherwise complying with the rules of the court, &c., and make return hereon of your doings in the premises.

Witness the Honorable Edward H. Durell, judge of said court at New Orleans, this 23d day of January, A. D. 1867, and the 91st year of the independence of the United States.

(Signed) CHA'S CLAIBORNE,
Clerk.

24 *Marshal's return.*

Received January 23d, 1867, for the steam tow-boat Calhoun, and same day, month, and year released the tow-boat Calhoun unto the claimants by giving a written order to the keeper of said vessel, who released said vessel, and took a receipt from the captain of the same, which order and receipt are on file in the United States marshal's office.

New Orleans, January 23d, 1867.

(Signed) J. J. PREIS,
Deputy U. S. Marshal, Dist. of La.

Consent to bond the Harry Wright.—Filed January 24th, 1867.

THE ECLIPSE TOW-BOAT COMPANY
vs.
THE STEAMSHIP MERRIMAC, AND TOW-BOATS Calhoun and Harry Wright. } No. 8687.

In the United States district court for the district of Louisiana.

We consent that the steamboat Harry Wright, seized in this case, be released by the marshal from seizure on a bond being furnished,
25 conditioned according to law, with good and sufficient security, in the sum of fifteen thousand dollars.

New Orleans, January 24th, 1867.

(Signed) BUCHANAN & GILMORE,
Proctors of Libellants.
(Signed) D. STICKNEY, *Claimant.*
(Signed) C. SCHNEIDER,
For SCHNEIDER AND ZUBERBIER.

Bond for release of Harry Wright.—Filed January 24th, 1867.

UNITED STATES OF AMERICA,
District of Louisiana:

Know all men by these presents that we, H. Wright, D. Stickney, & C. Schneider, claimants of the steamer Harry Wright, as principals, and Conway Bro., as sureties, are held and firmly bound unto the libellants in the sum of fifteen thousand dollars, lawful money of the United States of America; for the payment whereof to the said libellants, their heirs, executors, administrators, or assigns, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents. Witness our respective names and seals hereunto affixed
26 by us at New Orleans, this 24th day of January, one thousand eight hundred and sixty-seven.

Whereas an admiralty warrant was lately issued out of the district court of the United States of America for the district of Louisiana, at the suit of Eclipse Tow-boat Co. vs. St'r Merrimac, Calhoun, and H. Wright, their tackle, apparel, and furniture, and numbered 8687 on the docket of the said court, commanding the marshal to seize and take into

his possession the said three vessels, which have been seized accordingly, but from which seizure the said st'r Harry Wright was released and delivered to the claimant and owner thereof, by reason of the signing, sealing, and delivery of these presents, said claimant having obtained leave to bond said property, and filed a claim thereto which is now of record in the clerk's office of this court: Now, the condition of the above obligation is such, that if the said claimants and sureties abide by all the orders, interlocutory or final, of the court, and pay the said libellants the amount awarded by the final decree rendered in the court to which the process is returnable or in any appellate court, then the foregoing
27 obligation is to be void; but otherwise shall remain in full force and virtue.

(Signed) H. WRIGHT. [L. S.]
(") D. STICKNEY. [L. S.]
(") C. SCHNEIDER. [L. S.]
(") CONWAY & BRO. [L. S.]

and (Signed) A. M. BUCHANAN,
Proctor, who consents.

Signed, sealed, and delivered in the presence of—
(Signed) K. LOEW,
D'y Clerk.

Writ of release.—Issued January 25th, 1867.

UNITED STATES DISTRICT COURT,
District of Louisiana, ss:

NEW ORLEANS, CLERK'S OFFICE.

ECLIPSE TOW-BOAT CO.
vs.
ST'R MERRIMAC, CALHOUN, AND HARRY WRIGHT, } No. 8687.

The President of the United States of America to the marshal of the district of Louisiana or his lawful deputy, greeting:

28 Whereas D. Stickney and C. Schneider, owners of said steamer Harry Wright, hath this day filed a claim thereto on behalf of themselves, and which said claim is now of record in this office, you are hereby authorized to release the said st'r Harry Wright from seizure, and her to restore to the possession and custody of said claimants, they having given bond conditioned as required by law, and otherwise complying with the rules of the court, &c., and make a return hereon of your doings in the premises.

Witness the Hon. Edward H. Durell, judge of the said court, at New Orleans, this 24th day of January, A. D. 1867, and the 91st year of the independence of the United States.

(Signed) K. LOEW,
D'y Clk.

Marshal's return.

Received January 24th, 1867, and same day, month, and year released the tow-boat Harry Wright, named herein, by going on board of the

same and taking away the U. S. marshal's keeper of said vessel
29 and delivering possession of the same to the captain thereof.
New Orleans, January 24th, 1867.
(Signed) J. J. PREIS,
D'y U. S. Marshal.

Claim and answer of A. S. Mansfield.—Filed January 28th, 1867.

United States district court, district of Louisiana. In admiralty.

ECLIPSE TOW-BOAT COMPANY
vs.
STEAM TOW-BOAT CALHOUN & ALS.

Claim.

And now comes before said court A. S. Mansfield, resident, for the time, of New Orleans, in said district, and claims that the said steam tow-boat Calhoun is owned by him, and no other person is owner thereof. Wherefore he prays that said ship and appurtenances may be delivered to him upon his entering into such stipulations as this honorable court shall order in the premises.
(Signed) A. S. MANSFIELD.

Sworn to and subscribed before me this 28th day of January, 1867.
(Signed) CH'S CLAIBORNE,
Clerk.

30 Answer.

And now comes A. S. Mansfield, owner of the steam tow-boat Calhoun, &c., and for answer to the libel of the Eclipse Tow-boat Company against said tow-boat Calhoun, her engines, machinery, boats, tackle, apparel, and furniture, doth alledge and propound as follows, to wit:

First. That said Mansfield is the true and lawful owner of said boat, her machinery, engines, boats, tackle, apparel, and furniture, and no other person is the owner thereof.

Second. That, as to the first charge in the libel contained, this respondent has no knowledge, information, or belief; and that, as to second, third, fourth, and fifth charges in said libel contained, the allegations, so far as concern the Calhoun, are in the main untrue, and falsely alledged.

Third. That, at the time of the pretended collision of the Calhoun and Gladiator, the Calhoun was a duly enrolled, registered, and licensed tow-boat, engaged in her proper and legitimate business of towing, and was made fast to the steamship Merrimac, and assisting in tow-
31 ing said ship up the river Mississippi; that said Merrimac was in charge of the proper pilot, as by law required, and that said Calhoun was wholly under the charge of the Merrimac, and under the control and guidance of her (the Merrimac) proper officers; and that the collision between the Calhoun and Gladiator was caused, so far as the Calhoun is concerned, either by inevitable accident or by and through the sole fault and neglect of the steamship Merrimac, or the Gladiator, her officers and pilot, and not by the fault, neglect, or agency of the Calhoun.

Fourth. That, all and singular, the premises are true. In verification

whereof, if denied, this respondent craves leave to refer to the depositions and other proof to be by him exhibited in this case.

Fifth. Wherefore this respondent prays this honorable court would be pleased to pronounce against this libel, and to condemn the libellants in costs, and otherwise right and justice do in the premises.

(Signed) A. S. MANSFIELD.
(Signed) H. D. STONE,
Proctor.

32 Sworn to and subscribed before me this 28th day of January, 1867.

(Signed) CH'S CLAIBORNE, *Clerk.*

Notice to take testimony.—Issued February 8th, 1867.

United States district court, district of Louisiana.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC & STEAM TUG-BOATS CALHOUN and Harry Wright. } No. 8687.

To Sullivan, Billings & Hughes, H. D. Stone, and D. Stickney, claimant:

You are hereby notified that testimony will be taken in the above-entitled cause on Saturday, the 9th day of February, 1867, at the clerk's office of this court, at 5 o'clock p. m., on behalf of libellants.

[SEAL.] (Signed) K. LOEW,
D'y Clerk.

NEW ORLEANS, *February 8th*, 1867.

Marshal's return.

Received February 8th, at 3 p. m., and same day served a copy of the within notice on J. P. Sullivan, esq., personally, at the office of
33 Sullivan, Billings and Hughes, esq's, the attorneys named herein, and on H. D. Stone, esq., the attorney named therein, and on D. Stickney, claimant, each personally.

New Orleans, February 8th, 1867.

(Signed) M. EGAN,
D'y Marshal.

Testimony for libellant.—Filed February 9th, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMACK, STEAM TUG-BOAT CALHOUN and Harry Wright, &c. } No. 8687.

Testimony for libellant, taken before Ch's Claiborne, U. S. comm'r, this 9th February, 1867, in presence of A. M. Buchanan, proctor for libellant, Edw'd C. Billings, proctor for S. S. Merrimac, and H. D. Stone, for tug-boat Calhoun.

ALEXANDER KROG, being first duly sworn, says:

I am the first mate of the Norwegian ship Celuta, which was on the bar at the Southwest Pass on the 11th day of January last; she

34 was bound from Liverpool to New Orleans; she got aground on the bar in the daytime; I think it was on the 10th; the day after, the Switzerland on the starboard side, and the Gladiator on the port side, made fast to us; she was aground, and they were working at her to get her off; sometimes they would move her, and sometimes not. It was about three o'clock in the afternoon when these three steamers, the Merrimack in the middle, Calhoun on the starboard side, and the Harry Wright on the larboard side, all lashed together, approached the bar; our pilot told us there was a buoy, and he said that buoy marked a wreck; I can't say how far that buoy was; it was not far off; at the time our vessel was stuck fast in the mud; the steamers were working their engines, but we were not moving, as far as I could see; we saw the three steamers coming in very fast from aft; when I first saw them they were not far off, and were coming in very fast; at the same time that the steamer should pass us, the Calhoun ran into the Gladiator, and touched her on the port side, in the middle first; she touched her
35 so hard that she knocked down all their houses and upper work; the bow of the Calhoun touched the Gladiator; her whole length ran over the Gladiator, and broke everything that was on deck; the steam pipe was broken, and shoved on the other side; the three steamers appeared to be all moving; the Calhoun was moving, at any rate; I cannot tell whether they were under full or half steam; the Calhoun was going ahead; I cannot tell what took place afterwards, because I went down from the railing, being afraid that the Gladiator's boiler would blow up; all the steam of the Gladiator went out, and her engines were stopped. The Gladiator did not work upon us after that; after that the Celuta dropped her anchor, and the Switzerland took the Gladiator in tow and towed her up, leaving the Celuta at anchor. I don't know anything more.

Cross-examined:

I am a Norwegian by birth; I don't understand the English language perfectly.

Re-direct:

36 All the foreging deposition has been given by me in English, although I have an imperfect knowledge of the language.

(Signed) ALEXANDER KROG.

Sworn to and subscribed before me the 9th February, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

CHRISTIAN JOHANSEN, being first duly sworn, says:

I saw three steamers coming astern first; the names I don't know; the ship Celuta was lying on the bar, with one steamer on each side; then the steamers came running—I cannot say whether they were running fast or slow—and touched the Gladiator aft of the fore-rigging, breaking and moving the houses over to the starboard side; the steam-pipe was broken; the steam ran out of the boiler, and the other two steamers backed astern, and then the steamers on our starboard side let go the rope and dropped astern of our ship and took the Gladiator in tow, and towed her up the river—I do not know where—and we let drop
37 the anchor and paid out chain; I know nothing of what occurred afterwards. I do not remember whether this took place in the morning or afternoon; it was broad daylight; as far as I remember, it was not a bright day, but I could see far off; the Gladiator was badly injured.

Cross-examined:

The Celuta was aground; she was not afloat. We paid out chain, although the vessel was aground. I don't know if it was the pilot who gave the order. I think I saw the three vessels three minutes before they touched the Gladiator. I can't state the distance.

TRANSLATION.—Translated for me by Capt. Thornwald Damnevig, of the ship Celuta.

(Signed) CHRISTIAN JOHANSEN.

Sworn to and subscribed before me this 9th February, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

THORNWALD DAMNEVIG, being first duly sworn, says:

I am and was captain of the ship Celuta at the time of the collision the other witnesses have spoken of. I was in the cabin, but
38 when I left the deck before the collision she was as hard aground as she could be, and they could not move her. When I say that they could not move the Celuta, I mean the two tug-boats; the Switzerland, who was on the starboard side, and the Gladiator, who was on the larboard side, used their utmost exertions, and could not move her. I left the deck and went into the cabin about a quarter of an hour before the collision. Being in the cabin I felt the shock of the collision. I did not go on the deck; I remained in the cabin because I thought the Gladiator would blow up. I would not go out on deck. I came on deck *as* soon after the noise of the steam ceased. The steam-pipe of the Gladiator was broken and made an awful noise. It was not more than 10 minutes after the collision that I came on deck. I found the Gladiator in very bad condition, I found that the house on deck of the Gladiator had moved over to the starboard side and that it was partly broken and that the funnel had moved too; what damage the engines suffered I don't know; the Gladiator was disabled.
39 She was taken from alongside the Celuta and towed up the river by the Switzerland. Before that the pilot ordered the Celuta to let go the ancher and pay out some chain in order to keep the head against the current as he told me. As soon as the engines of the Switzerland had stopped, the ship dropped a little astern. Then the Switzerland took the Gladiator in tow and towed her up and we were left alone on the bar. I don't recollect very distinctly but I think the Merrimac remained on the bar till the day after.

(Signed) THORNWALD DAMNEVIG.

Sworn to and subscribed before me this 9th February, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

Claim of N. Y. M. S. S. Co.—Filed February 9th, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC AND TOW-BOATS

To the Honorable Edward H. Durell, judge of the district court of the United States for the district of Louisiana:

40 And now into this hon. court comes the New York Mail Steam-

ship Company, a corporation duly created and organized under and by virtue of the laws of the State of New York, and by W'm Creevy their duly authorized agent, intervening for their interest in the steamship Merrimac her engines, machinery, boats, tackle, apparel, and furniture and claim the said steamship, her engine, machinery, boats, tackle, apparel, and furniture, and state that they are true and lawful owners thereof.

And therefore the said claimants pray that this hon. court will be pleased to decree a restitution of the same to them and otherwise right and justice to administer in the premises.

(Signed) WILLIAM CREEVY,
Agent for the Claimants.

Sworn to, February 9th, 1867, before me.
(Signed) CH'S CLAIBORNE,
Clerk.

Answer of the N. Y. Mail S. S. Company.—Filed February 9th, 1867.

41 To the Hon. Edward H. Durell, judge of the district court of the United States:

The answer of the New York Mail Steamship Company, a corporation created and organized under and by virtue of the laws of the State of New York, intervening for the interest in the steamship Merrimac, her engines, machinery, boats, tackle, apparel, & furniture, to the libel of the Eclipse Tow-boat Company, answers and alleges as follows:

That these respondents deny each and every allegation in the articles in said libel contained except as is hereafter admitted.

First. As to the truth of the allegations contained in the first article of said libel, they are ignorant and therefore they deny all and singular said allegations.

Second. That these respondents aver that, as to the matter contained in the second, third, fourth, fifth, and sixth articles of said libel they have no personal knowledge, but understand and believe that the same are in a great part falsely alledged and that the truth is as is hereinafter alledged: That, on the 11th day of January, A. D. 1867, the steamship Merrimac was lashed to and towed by the steam tow-boat Calhoun, and the steam tow-boat Harry Wright. That the three steamboats having tried without success every other passage across the bar and up the Mississippi River, and having by sounding ascertained the depth of the water in the passage between the "wreck" mentioned in the said libel and the steam tug-boat Gladiator, (which were two hundred feet and upwards apart,) and that there was sufficient depth of water to allow their coming up said passage, did, in a proper and skillful manner, attempt to come up said passage, and that after they had passed said steam-tug Gladiator some twenty feet, and upon the vessel's striking shoal water they became unmanagable and canted two points towards the said Gladiator, whereupon immediately all that was possible was done by each of said vessels to prevent a collision with said Gladiator, but ineffectually, and that the steam-tug Calhoun did collide with the steam-tug Gladiator, doing her some damage, the extent of which these respondents do not know. That said collision was the result of the said vessel's canting after striking the shoal water and could not have been anticipated or prevented. That the attempt of said vessels to pass up said passage was good seamanship and would have been successful, and without collision with or injury to the said Gladiator but

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for the unforseen accident of the canting of the vessels which the most skillful seamanship could not anticipate.

Fourth. And these respondents further propound and state that the said steamship Merrimac and the said steam-tugs Calhoun and Harry Wright were, at the time of the said collision and during the whole time of the grievances complained of, under the control of Amos Irwin, a duly licensed "Branch pilot," who pilot first offering himself to them as they approached the mouth of the Mississippi River. That the employment of said pilot was under the laws of shipping and insurance, as well as under the laws of the State of Louisiana, compul-
44 sory upon the said vessels, and that they are in no way responsible for the management of said vessels or for any damage by them done, they being under the control and management of said pilot. Wherefore the respondents pray this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellants in costs, and otherwise law and justice to administer in the premises.

(Signed) WILLIAM CREEVY,
Ag't for the Claimants.

(Signed) SULLIVAN, BILLINGS, & HUGHES,
Proctors for Claimants.

Sworn to and subscribed before me this 9th day of Feb'ry, 1867.
(Signed) CH'S CLAIBORNE, *Clerk.*

Testimony for libellants.—Filed February 13th, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC AND STEAM TUG-BOATS CALHOUN and Harry Wright, their tackle, &c. } No. 8687

45 Testimony on behalf of libellants, taken before Ch's Claiborne, U. S. commissioner, this 13th February, 1867, in presence of A. M. Buchanan, proctor for Eclipse Tow-boat Company, Edw'd C. Billings, proctor for S. S. Merrimac, H. D. Stone, for tug-boat Calhoun.

Capt. THORNWALD DAMNEVIG, recalled for libellants, says:

The Celuta was lying aground on the bar three or four days; I cannot state exactly. I noticed that buoy, which marked the place where the wreck was; there was also a ripple of the water indicating the place where the wreck was. There was perhaps room enough between the Gladiator and ripple for one vessel to pass, but not enough for two or three to pass, in my opinion. It is difficult to judge the distances on the water. I should judge there were about 10 fathoms from my vessel to that ripple, perhaps twelve fathoms. We were to the eastward of the wreck.

The three vessels, the Merrimac, with the Calhoun and Harry
46 Wright on each side of her, came between the wreck and the Gladiator. There was the Bremen ship Carl, on the western side of the buoy that marked the wreck, aground on the bar; and higher up, also to the westward of the buoy, the steamship Morning Star. I can't say how far she was from the buoy, but she was so near it, that I did not think it safe to come on that side of the wreck when coming in. The Carl afterwards changed her position and the Celuta passed between the buoy and the stern of the Carl afterwards.

Cross-examined:

I don't know, of my own knowledge, that there was any wreck there.

It is difficult to judge, but in my opinion, there was not room enough between the wreck and the Gladiator for three vessels to pass. I am positive that there was not room enough for three vessels to pass. I will further add that it was impossible for three vessels to pass without either coming in the ripple or in collision with the vessels. I can't tell the depth of water over the wreck, it was between 14 or 14½ feet deep by the sides of my vessel. The Carl, in my opinion, was
47 about 10 fathoms from the buoy at the time of the collision.
(Signed) THORNWALD DAMNEVIG.

Sworn to and subscribed before me, this 13th February, 1867.
(Signed) CH'S CLAIBORNE, *Clerk.*

Claim and answer of steam tow-boat Harry Wright and owners.—Filed February 16th, 1867.

United States district court, district of Louisiana. In admiralty.

THE ECLIPSE TOW-BOAT CO.
vs.
STEAMSHIP MERRIMAC AND STEAM TOW-BOATS Calhoun and Harry Wright. } No. 8687.

And now into this hon. court come Schneider and Zuberbier, a commercial firm domiciled in this city, and composed of Christian Schneider, Herman Zuberbier, and Louis Schneider, intervening for their interest herein, and claim that they are the sole owners of the
48 steam tow-boat Harry Wright, and that no other person or persons are owners thereof.

Wherefore they pray this hon. court will be pleased to decree a restitution of the same to them, and otherwise right and justice to administer in the premises, and for answer to the libel of the Eclipse Tow-boat Company, they answer and allege as follows:

That these respondents deny each and every allegation in said libel contained, except such as are hereinafter admitted, and they further articulately answer—

First. That as to the truth of the allegations contained in the first article of said libel, they are ignorant, and therefore deny all and singular said allegations.

Second. That in answer to the allegations in the second, third, fourth, fifth and sixth articles of said libel contained, these respondents aver that, so far as they concern the said tow-boat Harry Wright, her tackle, apparel, and furniture, the same are in the main untrue and falsely alleged, and that the truth is as is hereinafter alleged.

49 Third. That, at the time of the pretended collision of the "Calhoun" and "Gladiator" the Harry Wright was a duly enrolled, registered, and licensed tow-boat, engaged in her proper and legitimate business of towing, and was made fast to the larboard or port side of the steamship Merrimac, and assisting in towing said steamship up the River Mississippi; that said steamship Merrimac was in charge of the proper pilot, as by law required; and that said Harry Wright was wholly under the charge of the said steamship Merrimac, and under the control and guidance of the Merrimac's proper officers; and that the collision between the Calhoun and Gladiator was caused, so far as the Harry Wright is concerned, either by inevitable accident or by and through the sole fault and neglect of the steamship Merrimac or the

Gladiator, her officers and pilots, and not by the fault or agency of the Harry Wright.

Fourth. That all and singular the premises are true. In verification whereof, if denied, respondent begs leave to refer to the depositions and other proofs to be by them exhibited in this cause.

50 Wherefore these respondents pray this honorable court would be pleased to pronounce against said libel, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises.

(Signed) HORNOR & BENEDICT,
Proctors.

HERMAN ZUBERBIER, being duly sworn, deposes and says that he is a member of the firm of Schnieder & Zuberbier, and that all the facts and allegations in the foregoing claim and answer contained are true and correct.

(Signed) HERMAN ZUBERBIER.

Sworn to and subscribed before me this 15th day of February, 1867.

(Signed) K. LOEW, *D'y Clerk.*

Testimony for S. S. Merrimac.—Filed February 21st, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC AND OTHERS. } No. 8687.

Testimony on behalf of claimants of S. S. Merrimac, taken before
51 Ch's Claiborne, U. S. commissioner, this 21st February, 1867.

Present, Edw'd C. Billings, proctor for S. S. Merrimack; H. D. Stone for tug-boat Calhoun; and W. S. Benedict for tug-boat Harry Wright; and A. M. Buchanan, proctor for libellant.

EDWARD VAN SLICE, being first duly sworn, says:

I am captain of the S. S. Merrimac. About the middle of January we arrived outside the bar, from New York, via Havana. At our arrival at the bar we received a bar-pilot on board. He was the first pilot who offered himself. We took him on board the Merrimac and gave him charge of her, as it is customary. He told me the water was very bad on the bar, and that the bar was blocked with vessels. He remained in command till the vessel was safely over the bar—from Monday night till Saturday afternoon. He remained in command until after the collision with the Gladiator. He gave all the orders. The tug-boats Cal-
52 houn and Harry Wright had been attached to the Merrimac about half an before the collision. After they were attached the pilot was in charge of all three boats, the two tug-boats and the Merrimac, and gave the orders. I knew the position of the wreck-buoy with reference to the tug-boat Gladiator, which was attached to the Celuta. There was room enough between the wreck-buoy and the Gladiator for the three vessels, and another one besides, to pass. This I observed while I was on deck, standing at the pilot-house, before the collision. I saw the buoy on one side and the Gladiator on the other. We were heading well up for the wreck-buoy, in order to guard against the current taking us on the port bow, thereby sheering us over towards the Gladiator. At that time, when nearly up abreast of the Gladiator, when there was room between the Calhoun and Gladiator for another steamer,

we took a sheer with all helm hard astarboard, and the boat on the port side, the *the* Harry Wright, backing by order of the pilot, but could not stop the ship, and slide bodily over on the Gladiator, the Calhoun's
53 guard striking the Gladiator, at which time my ship's bowsprit was ahead of the Celuta's bowsprit. This sheer was a sudden one. The cause of that sheering was the ship's heels touching the ground, the ship drawing more water aft than forward.

(Being asked whether this sheering could be anticipated,

Question objected to by proctor for libellant, and answer, subject to the objection, says:)

No; a sheering is always anticipated, but you cannot guard against it until the ship starts on a sheer. We got over the bar the afternoon after the collision—Saturday afternoon. The pilot a number of times made efforts to pass the bar at some other place, prior to the collision. The reason why it is impossible to guard against a sheering is because she is as liable to sheer one way as the other. This was true in this case. In my opinion but for this sheering there would have been no collision.

Cross-examined:

I took the pilot Monday night previous to this action. This collision happened on Saturday. I took the pilot when at anchor outside
54 of the bar. I have been here several times, and am pretty well acquainted with the bar. The name of the pilot is Amos Towne. There were a number of vessels aground on the bar at the time. The buoy that I speak of marked the place of the wreck aground on the bar. The wreck is out of sight, under water. I don't know how much water there is on the wreck, but all vessels of any draught avoid it for fear of danger. When I say vessels of any draught, I mean vessels drawing 12 or 14 feet of water. I have seen tow-boats go over it. I have seen the America, who draws 14 feet, go over it. I can't say how much water there was on the bar, when the America went over the wreck, but I went out, drawing 17 feet four inches. I at one time had no more than 13 feet water. The Celuta was going in at the time; she had previously been aground at another place on the bar. I cannot say whether the Celuta was moving or was aground at the time. They could move her either way, her head one side and the other. They did
55 get her head too far to the eastward, and then straightened her up. After the collision they did move her and drop her to anchor with only one boat, the Switzerland. This movement I speak of—of canting her head too far to the eastward—was before the collision. The boats straightened her up on the bar also before the collision. After the collision the Gladiator let go the ship and drifted off, and after the ship was at anchor, the Switzerland let her go, and towed the Gladiator up the river. The Gladiator was disabled by this collision. I can't state the damage she suffered. I observed the steam flying, hailed them, and if any one was hurt, and being satisfied from their answer that nobody was hurt, I asked no more questions. The Celuta was to the eastward of the buoy. The buoy was on the port bow of the Celuta. The ship Carl was aground on the bar to the westward of the buoy, and the ship Morning Star to the westward of the Carl. I can't say the
56 distance from the Carl to the buoy, but not sufficient to go through with a great ship without running great danger. There was considerable distance between the Carl and Morning Star. There was sufficient room between the Carl and Morning Star for my ship to pass, but there was not water enough. There were various depths of water on

the bar at the time I attempted to pass over. Between the buoy and the Carl was the best water; I mean the deepest water. The stern of the Carl lay directly in the channel. [The depth of the water between the Celuta and the buoy, where I attempted to pass, had just been sounded by the bar river pilots; they reported to me that there was not less than 13½, mostly 14 & 14½, and from that up to 16 feet water.] The depth of water between the Celuta and the buoy, where I attempted to pass to the eastward of the wreck-buoy was 15 to 16 feet. The pilots sounded the depth of the water on the morning of the collision; where my ship's nose was at the time when the sheer took place there was 15
57 feet water, but her heel was in shoaler water. I cannot say the depth of water where her heel was; my ship was going over shoal water all the way up. She was touching lumps all the way up, because she was drawing more water than she was going over; she was going straight up the current. That portion of my testimony included in brackets refers to the soundings from the bar-buoy up by the wreck-buoy. The bar-buoy to the wreck-buoy forms the major part of the bar, although there is shoal water above that, but not so shoal as below. As near as I recollect, the Merrimac drew between 15 & 16 feet water. She didn't draw the same depth of water aft *than* forward; the difference is all of three feet, if not more; the draught of the ship is noted in the official log. When I said that she drew 15 feet, I mean that she drew that aft; the greatest draught was aft. The Merrimac is 280-odd feet over all; her tonnage is 2,200 tons. I should judge the Celuta is a ship of 800 or 900 tons, but I took no particular notice of her.
58 The Merrimac is longer than the Celuta. When the collision took place the bowsprit of the Merrimac was ahead of that of the Celuta. I only noticed that, when I came to back down, the bow of the Merrimac was in advance of the bow of the Calhoun, which was lashed alongside. The Calhoun was the vessel that came in contact with the Gladiator. After the vessels came in collision all three backed. The Calhoun cut the hauser and let go; she cut the hauser by which she was lashed to my ship. I backed down with my ship and Harry Wright out of the channel outside the bar, because my ship swung athwart. I went entirely out of the bar; I don't exactly know how far. I presume it was half a mile from where the collision took place. I think I did not attempt to cross the bar again till the next morning; I don't recollect. The collision took place in the afternoon; can't say at what time. As I have said before, the reason of the sheer was the ship's heel dragging, and the current taking her on the port bow. I was in the vicinity of the pilot-house at the time.

59 Examined by proctors for Harry Wright and Calhoun:

There would have been no collision had not the Merrimac sheered. It was neither the Calhoun nor Harry Wright that caused the sheer. After the sheer of the Merrimac began, all three of the boats did all in their power to prevent the collision, which could not be done. The Harry Wright was backing after the sheer, and before the collision, by order of the pilot in charge of the Merrimac. Neither the Calhoun nor Harry Wright had anything to do in selecting the route that they should go.

Cross-examined:

The Calhoun and Harry Wright were employed and paid by me to tow my ship over the bar. They are engaged in the business of towing vessels. There was no bar-pilot on either the Calhoun or Harry Wright. The Merrimac was not towed all along to the city by these

two tow-boats; they were engaged only to assist her over the bar.
60 The Merrimac, though a powerful steamer, employed these two tow-boats to tow her over the bar to prevent sheering. It was not because it was known that the Merrimac drew more water than there was on the bar; it was not because it was anticipated that the Merrimac might touch in going over the bar, but solely to prevent her sheering.

Redirect:

The Celuta was put on the bar the night previous to the collision, the tow-boats attempting to take her through between the Carl and the Morning Star, but failed, and she laid aground, below the Carl, all night. Just after my pilot had sounded to the eastward of the wreck-buoy, the Gladiator and Switzerland went to the Celuta, backed her off, and started to go to the eastward of the wreck-buoy; the current gave them a sheer; they got the ship heading too much to the eastward and too low down, but they straightened her up and slue' her to and fro several times, which showed to me that they could handle her, although in shoal water. This change of position of the Celuta took place about
61 half an hour before the Merrimac and her tugs attempted to pass.

Recross:

The attempt of the Merrimac to pass to the eastward of the wreck-buoy was her first attempt to cross the bar to the eastward of the buoy, but all the other attempts were made to the westward of the wreck-buoy. I cannot say how many attempts I made to cross the bar before *to* the collision. I can only say that I was at it day and night. All the attempts were made under the command and control of the bar-pilot. I succeeded in crossing the bar the day after the collision. I think I crossed it westward of the wreck-buoy. I did not cross it the next attempt I made after this collision took place. I don't remember how many attempts I made to cross the bar after the collision before I finally succeeded to cross it, but the time I crossed it was the third attempt that day. None of the attempts after the collision were made to the eastward of the wreck-buoy, because the Carl had shifted her po-
62 sition, leaving the channel opened between her and the wreck-buoy. It was thick weather on the day I went in, or I should have *went* in on the first attempt to cross to the westward of the wreck-buoy. I don't know when the Carl got on the bar westward of the wreck-buoy. She was there when I arrived at the bar.

(Signed) EDW'D VAN SICE.

Sworn to and subscribed before me this 21st February, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

JOHN H. PLATT, being first duly sworn, says:

I was first officer on board of the Merrimac at the time of the collision referred to in Capt. Van Sice's testimony. I was on board of her at that time. I have heard the testimony of Capt. Van Sice; it is correct in all material respects. I heard particularly his testimony in reference to the distance between the Gladiator and the wreck-buoy. I think it is correct. I think the distance was about 200 feet. The distance was nearly twice room enough for three vessels, lashed together, to pass. The cause of the collision, I presume, was, that the Merrimac touched
63 on her heels; then she sheered. But for the sheering we should have gone clear of the vessels. When the sheering occurred, our bow was about as much as 20 feet ahead of the bow of the Celuta. We

took on the bar-pilot outside of the bar; his name is Amos Towne; he was the first pilot who offered himself; the pilot had control of the Merrimac and the tugs from the time he came on board to the time we finally crossed the bar; he decided when and at what points the attempts to cross the bar should be made; he decided that this attempt should be made which resulted in the collision; he gave the orders both for the management of the Merrimac and the tug-boats. These orders were obeyed, as far as I saw.

Cross-examined:

We were at the bar from Monday night to Saturday. The collision took place on Friday. During these days we remained on the bar, trying to cross it. There were quite a number of vessels aground on the bar.

64 Being asked what opportunity he had of judging the distance between the Gladiator and the wreck-buoy, says: I was on the forecastle, and could see all the space between the wreck-buoy and the vessels. I was there a very short time, where I had an opportunity of judging the distance. From the time that we got clear from there, there was about 20 miles. There appeared to be much confusion on the Gladiator, but not on the other vessels. I saw the steam flying from the Gladiator. The breadth of the beam of the Merrimac is about 40 feet. The Calhoun and Harry Wright, which were lashed to the sides of the Merrimac, were both side-wheel steamers. I judge they were each 30 or 35 feet from outside to outside of their paddle-boxes. They are high-class tow-boats. At the time I was where the first officer's post is, on the forward part of the vessel, near the anchors. The pilot-house is forward. I had no communication with the pilot, except through the captain. I heard the orders given by the pilot, "Hard astarboard, and back on the Harry Wright."

Examined by proctors for Calhoun and Harry Wright:

65 There would have been no collision had not the Merrimac sheered. Neither the Calhoun or Harry Wright was cause of the collision. They obeyed the orders of the pilot. Neither the Calhoun nor the Harry Wright could have prevented the collision after the sheer of the Merrimac began.

Redirect:

The Merrimac, Calhoun, and Harry Wright after the sheering obeyed all the orders of the pilot, and did all in their power to prevent a collision.

Recross:

I saw the buoy and noticed it, the more so that I knew if we could pass it we would be all right. It is the worst part of the bar. In passing, the Harry Wright was not directly between the Merrimac and the wreck-buoy, but she would have been if she had got up far enough. The bow of the Merrimac was abreast of the wreck-buoy. The bow of the Harry Wright was 30 or 40 further aft than the bow of the Merrimac. At the time the vessels took the sheer the bow of the Harry Wright was not up to the wreck-buoy, but at the time of the collision it was nearly up to it.

66 (Signed) JOHN H. PLATT.

Sworn to and subscribed before me this 21st day of February, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

Testimony for libellants.—Filed March 8th, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, CALHOUN, & HARRY WRIGHT. } No. 8687.

Testimony taken before C. Claiborne, U. S. comm'r, March 8th, 1867. Present: Buchanan & Gilmore for libellants; Sullivan, Billings & Hughes for Merrimac; H. D. Stone for the Calhoun.

THEODORE SCHULTZ, sworn for the libellants, says:

I am the pilot of the tug-boat Gladiator, belonging to the Eclipse Tow-boat Company, and I was so on 11 January last, when the Gladiator had hold of the Celuta. Our position was about 60 feet to the southward and eastward of the wreck-buoy. The Switzerland had hold of the Celuta on the starboard and the Gladiator on the port side.
67 The Celuta was fast on the bar, bound in; the two tug-boats had put her there in bringing her over the bar. We had put the Celuta on the bar the evening previous with two tug-boats belonging to our line—not the Switzerland—but two tug-boats like the Gladiator. The ship was on her way in. We were getting here in when we were forced to stop the engines to prevent the Celuta from coming into collision with the S. S. Havana that was lying across the channel, and we ceased working for the night. The ship Carl was also lying in the channel. The next morning the Switzerland came down after some consultation with the captain of the Gladiator and the captain of the Switzerland. They concluded to try to get the Celuta in that day. The Gladiator and the Switzerland then went alongside of the vessel, and the tide not being high at that time, we ate our dinner and *should* afterwards commenced working on the ship. Finding that we could not get her into the channel we tried to get her into the eastward of
68 the channel, which is sometimes called the east channel. After two or three attempts we tried to put the ship as near to the channel and the buoy, which is the same as the wreck-buoy, as we could, so as not to endanger the ship against the wreck, which is under water at that place. Our object in trying to get the ship so near to this wreck was because the most water is nearest to the wreck, but we failed in getting the vessel in, and she stuck fast. In the mean time that we were working at her I heard a whistle blowing outside of the bar. I saw the Harry Wright on the port side of the Merrimac, and I saw the vapors of the steam. I think there were 2 whistles blown, and I saw the vapor, and I believe it was the Harry Wright or the Merrimac that blew the whistles. The Calhoun was laying at anchor at the west of the bar, outside. Shortly after I saw the Calhoun going alongside the Merrimac on her starboard side. The Gladiator was then about 60 feet below the wreck to the southern*eastward* of the wreck. I then remarked to the captain of the Gladiator that, if the Celuta went ahead she
69 would go on top of the wreck, and we would have to stop our engines to prevent breaking our wheels. I looked around again and saw the Merrimac had gotten up her anchor with the Harry Wright and Calhoun alongside, watching an opportunity to come in on the bar. I then looked again to see if the Celuta was going ahead, and then looked around outside of the bar and saw the Merrimac and the Calhoun and Harry Wright coming in with full speed. These two tug-boats were then some 200 yards from us; called the captain's attention to the fact that they were coming in and remarked "Where are these fellows going," and said,

"The first thing they will be into us," and immediately after making this remark the Merrimac pointed right between us and the wreck, and the Calhoun immediately put her helm astarboard. Capt. Jackson of the Calhoun looked around with astonishment to see where they were going. Jackson threw up his hands and wondered where they were going
70 and made expressions to back, back. I saw one man on the pilot-house of the Merrimac, whom I supposed to be the bar-pilot of the Merrimac, looking intently where the vessels were going. Immediately after this the collision took place. Previous to the collision the captain of the Gladiator gave orders to let go our ropes, but the collision was so sudden that we had no time to get out of the way. We were struck by the Calhoun, which was the nearest of the three to the Gladiator. The 3 boats coming in were going at the rate of 8 knots an hour. It seems to me that the Calhoun struck the Gladiator forward and in going off she carried the after-work away. The guard of the Calhoun struck us. The Calhoun is a side-wheel boat with broad guards, and much higher out of the water than the Gladiator. The Gladiator is a tug propeller and has no guards; she has a house covering the engine and the cabin. The guards of the Calhoun projected over the Gladiator and swept
71 away the whole side of the house, made an opening in the boiler, bent the steam-pipe and knocked the cabin entirely over. The boiler was knocked over from its foundation and the pilot-house entirely displaced. The captain's room was entirely knocked in on one side, the water-closet carried away, and the lever of the engine bent. The cabin, cook-house, pilot-house, and engine were damaged, and removed from their places, a hole was made on the steam-drum by the guards of the Calhoun. The exhaust-pipe was also twisted off; the railing, staunchions, and riggings were broken and torn away, and some of the knees underneath were split. The Celuta, Gladiator, and Switzerland were thrown adrift by the force of the collision. The Gladiator was towed by the Switzerland to the telegraph station because she was disabled and afterwards towed *her* up to town by the tug-boat Perry. I was in the pilot-house at the wheel of the Gladiator when the accident hap-
72 pened, between 1 and 3 in the day. I think it was about 2 o'clock p. m. and perfectly clear day, without any fog whatever, but fine weather. I don't think that either one of the boats could have passed between the Gladiator and the wreck; there was not sufficient room to pass there without danger. I had paid particular attention to the wreck-buoy. After the collision had taken place I did not particularly remark the position of the vessels at the time of the collision; being apprehensive of my own safety I jumped on board the Celuta, and in the act of doing so, the steam escaped out of the boiler of the Gladiator as if it had been broken by the Calhoun's guards. When the danger was over I returned to the Gladiator and I met her captain standing at the rail of the Celuta when I remarked to him "This is awful." After the collision and after I had returned on the Gladiator, I remarked for the first time the position of the Merrimac, Calhoun, and Harry Wright: the Harry Wright was alongside of the Merrimac, drifting out over the bar;
73 the Calhoun had cast off and was in the act of coming up to see if any one was hurt. When I first noticed the Merrimac, Calhoun, and Harry Wright, they seemed to be coming in between the wreck-buoy and the ship Carl, where there was twice the room as there was between the wreck-buoy and the Celuta. Immediately after making this remark they changed their direction and came in the direction of the wreck-buoy and the Gladiator. I did not perceive that the vessels took any sheer.

Cross-examined:

I have been a pilot for pretty near a year; to the best of my judgment there was not over 60 feet between the buoy and the Gladiator. At the time of the collision the Gladiator and Merrimac both headed up stream. The Harry Wright has a width of about 60 feet. The Calhoun is wider still, some 10 feet, but am not sure. The Merrimac might have 50 feet beam on deck, perhaps more.

Being asked how was it possible for the Merrimac, Calhoun,
74 and Harry Wright, the three vessels forming a width of 180 feet, to pass through the small space of 60 feet and strike the Gladiator on the bow,

Answers: I say it was not necessary to go between us and the wreck to strike us on the bow because we were below the wreck. The Merrimac was coming up in a line parallel to that of the Gladiator. The captain of the Calhoun did not do all he could have done, for had he cast his boat loose, his own boat would not have struck us. Don't know that the captain of the Calhoun was under the orders of the Merrimac.

(Signed) THEO. SCHULTZ.

Sworn to and subscribed before me this 8th March, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

CAPT. SCHULTZ sworn for libellants, says:

I am and was in command of the Gladiator at the time of the collision; have been pilot since 1833 and in command of boats—tow-boats—for 24 years; I saw the collision; have heard the evidence given
75 by my son, Theodore, this day, and concur in the same in regard to the collision, and to the space of 60 feet spoken of by him. We were 60 feet in a triangle from the wreck; 60 feet to the southward and 60 feet to the eastward. The Gladiator was 60 feet to the southward and 60 feet to the eastward of the wreck-buoy. It was neither prudent nor safe to pass through the space between the Gladiator and the wreck-buoy for those 3 vessels that attempted to pass. I am as well acquainted with the bar as any other pilot on the river and bar. There was much damage done to the Gladiator; all the cabin, rigging, chain-plates, railings, staunchions were carried away; boiler knocked out of its place, steam-drum connection-pipes carried away. I noticed the steering of the 3 vessels as they approached me; did not see them take any sheer; they came in at full speed; they did not seem to deviate from the line they pursued. I observed and paid attention to their course. It was proper for the Merrimac to give two blasts of the steam-whistle to notify me that
76 they intended to come in between the Gladiator and the wreck-buoy, but they gave me no such notice, and blew no whistles.

Cross-examined by the Calhoun:

In my judgment the three vessels came in at full speed. The Merrimac governed all the speed; she carried them along. The Calhoun had stopped before she struck the Gladiator; she wanted to let go, but the speed on the three vessels was so fast that she had no chance—the three vessels being too close to us.

Being asked, Did not the Calhoun do all she could to prevent the collision, says:

She could not have prevented the collision, but could have cast off be-

"The first thing they will be into us," and immediately after making this remark the Merrimac pointed right between us and the wreck, and the Calhoun immediately put her helm astarboard. Capt. Jackson of the Calhoun looked around with astonishment to see where they were going. Jackson threw up his hands and wondered where they were going
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Cross-examined:

I have been a pilot for pretty near a year; to the best of my judgment there was not over 60 feet between the buoy and the Gladiator. At the time of the collision the Gladiator and Merrimac both headed up stream. The Harry Wright has a width of about 60 feet. The Calhoun is wider still, some 10 feet, but am not sure. The Merrimac might have 50 feet beam on deck, perhaps more.

Being asked how was it possible for the Merrimac, Calhoun,
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Answers: I say it was not necessary to go between us and the wreck to strike us on the bow because we were below the wreck. The Merrimac was coming up in a line parallel to that of the Gladiator. The captain of the Calhoun did not do all he could have done, for had he cast his boat loose, his own boat would not have struck us. Don't know that the captain of the Calhoun was under the orders of the Merrimac.

(Signed) THEO. SCHULTZ.

Sworn to and subscribed before me this 8th March, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

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I am and was in command of the Gladiator at the time of the collision; have been pilot since 1833 and in command of boats—tow-boats—for 24 years; I saw the collision; have heard the evidence given
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76 they intended to come in between the Gladiator and the wreck-buoy, but they gave me no such notice, and blew no whistles.

Cross-examined by the Calhoun:

In my judgment the three vessels came in at full speed. The Merrimac governed all the speed; she carried them along. The Calhoun had stopped before she struck the Gladiator; she wanted to let go, but the speed on the three vessels was so fast that she had no chance—the three vessels being too close to us.

Being asked, Did not the Calhoun do all she could to prevent the collision, says:

She could not have prevented the collision, but could have cast off be-

fore she came too near. I don't believe the captain of the Calhoun knew where he was going to; I don't know whether or not he knew where he was going.

(The proctors for libellants and for the Merrimac object to the witness's declarations about his belief.)

Cross-examined by the Merrimac:

77 At a distance of about 500 feet before reaching the Gladiator they ought to have changed their course so as to have gone between the Carl and the buoy, but instead of this they kept right straight on to where we lay. The Calhoun had time to cut off if they had their axes ready, but she had no time to cast off. As far as I could tell the Calhoun stopped her engines before she struck us, but her wheels were revolving at the time of collision. She may have been 120 feet from us when she stopped her engines. The engineer can stop the engines but cannot stop the headway of his boat suddenly; even at a distance of 500 feet from us the Calhoun would have had no time to cast off.

Re-direct:

There was no room for the three vessels to pass. Had I received notice by the steam whistle of the Merrimac that she intended to pass, although I was in my proper position, yet I would have cast off with the Celuta and gone out of the way. The width of the 3 vessels given by my son is not far out of the way. As they were coming in they must have gone over the wreck, which is from 5 to 6 feet under the
78 water. No vessels drawing more than the Harry Wright can go over that wreck without touching it. The Harry Wright does not draw over 4½ or 5 feet water.

(Signed) JACOB SCHULTZ.

Sworn to and subscribed before me this 8th March, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

JOHN CAMPBELL sworn for libellants, says:

I was the steersman of the Gladiator at the time of collision; saw the collision; saw the vessels come in. Knew the wreck-buoy; it was about 60 feet from the Gladiator to the southward and eastward of the Gladiator. There was no room for the vessels to pass, without going over the wreck. I was observing the vessels when they came in. They kept in, right straight in their way in, between us and the wreck. Did not see them take any sheer.

Cross-examined by Merrimac:

About 5 minutes before the collision I saw the vessels. There might have been a little over 60 feet.

Reëxamined by libellants:

79 The Gladiator is about 100 feet long, and there was not that length between the Gladiator and the wreck.

(Signed) JOHN his + mark. CAMPBELL.

Sworn to and subscribed before me this 8th March, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

PATRICK MORRISY sworn for libellants, says:

I was a fireman on the Gladiator at time of collision. Saw the vessels coming in, but did not see them take any sheer. The distance between the Gladiator and the buoy I don't know; but I know that there was not room enough for the 3 vessels to pass. Can't tell the length of the Gladiator; can't tell that the distance between the Gladiator and the buoy was the length of said tug-boat.

Cross-examined by Merrimac:

At the time of the collision I was on deck near the pilot-house; had been standing there some half an hour. I noticed the boats coming in, some 5 or 10 minutes before the collision, when the engineer called me down to stand by him, and my attention was diverted from the
80 vessels. When the Calhoun struck us I ran for my life.

(Signed) PATRICK MORRISSY.

Sworn to and subscribed before me this 8th March, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

GEO. SPENCER sworn for libellants:

Was a fireman on the Gladiator at time of collision. Saw the vessels come down on us up to 5 minutes before we were struck, when I went down into the fire-room. When we were struck I was in the fire-room. I knew this wreck-buoy. Can't tell that the Gladiator was far enough from the buoy that the vessels could pass. I did not see the vessels take a sheer.

(Signed) GEORGE his × mark SPENCER.

Sworn to and name affixed before me this 8th March, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

81 *Testimony for libellants.—Filed March 25th, 1867.*

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC AND STEAM TOW-BOATS CALHOUN and HARRY WRIGHT. } No. 8687.

Testimony on behalf of libellants, taken before Ch's Claiborne, U. S. comm'r, March 25th, 1867, in presence of the proctors of all parties.

MARTIN DAVIS, being first duly sworn, says:

I am master of the tow-boat Switzerland, and was so on the 11th day of January last between one and two o'clock when the collision between the Calhoun, Merrimac, Harry Wright, and the Gladiator took place. The Switzerland was on the starboard side of the Celuta, and the Gladdiator on the larboard side. This collision took place between one and 2 o'clock, and before that hour I ordered the Gladiator to take the ship away from the S. S. Havana under the lee on the bar; there we took in the wreck channel; we had given her a fair trial; she could not
82 get in, and we stopped to wait for high water. In the mean time the Harry Wright was made fast to the s'ship Merrimac, and the Merrimac blew one whistle which drew my attention; then when

the whistle was blown the Calhoun fired up and went alongside the Merrimac; that still drew my attention more. [Then I made my mind up to watch closely to see in what part of the river the Merrimac was going, so I could take my ship in.]

(Testimony included between brackets objected to by all the claimants.)

Then they came in, all three in one column. We were working then on the ship Celuta, which was aground fast. They pointed the Merrimac for us as straight as she could go. Then I told Captain Schultz to watch, they were coming and there was no room for them to pass. The first thing I saw was Capt. Jackson, of the Calhoun, stamped his foot down on deck as there was no room for him to pass. In the mean time they came on the Gladiator, ran into her, and tore her to pieces, her cabin, boiler, connection-pipes, steam-drums, railing, chains, steer-
83 ing apparatus, &c., &c. The men jumped on board the ship. I told them to cast the boat off and I'll tow her in. The Calhoun came up shortly afterwards; they asked me if nobody was hurt and I replied, no. The Calhoun, Merrimac, and Harry Wright backed out in the same line in which they came and anchored up outside the bar—backed pretty near the same place where they were before. The distance between the Gladiator and the wreck-buoy was 60 feet, angle southward and eastward from the wreck. The wreck that I speak of is about 6, 7 feet under water. The place where the wreck is is marked by a buoy. The vessels that had the Celuta in tow were southward and eastward of the wreck. The Gladiator was the nearest of the three to the wreck. I am acquainted with the bar, have been there some 30 odd years in the capacities of master, pilot, &c. It was not prudent for these vessels to attempt to come in between us and the wreck. It was fine, calm weather, the sun shining, the wind blowing southward and eastward. The ship Carl was westward of the buoy, and the S.
84 S. Havana was laying across the channel below the Carl. The Merrimac came in the next day. The Merrimac came in on the eastward of the buoy, the Carl having moved her position. This is what the captain and pilot of the Merrimac told me. I am positive that the distance between the Gladiator and the wreck was not more than 60 feet. We had been stuck fast in the identical position about two hours before the collision. I was in command of both tow-boats.

Cross-examined:

The three vessels came directly to us in a line. They did not change that course at all. The Gladiator was southward and eastward from the wreck, at a distance of 60 feet. The Calhoun stopped her engines when she was about her own length from the other vessels. She was then too near to avoid a collision. Had she stopped her engines at a distance of 300 feet from the Merrimac, she would have had time to back out without coming in collision. I observed the vessels from the time they crossed over the bar to the time they struck the Gladiator.
85 After the collision all three vessels, Calhoun, Merrimac, and Harry Wright, keeping the same line, backed out over the bar. They were attached to one another until they anchored over the bar. The collision did not knock them apart. I could not tell the width of the three vessels, but I know it was larger than the distance between us and the wreck. I will swear that the breadth of the three vessels abreast was wider than the distance between us and the wreck. I think there was less chance to pass on the west of the buoy than there was on the east. The Merrimac was pointed directly towards the Gladiator. Had I been in the place of the captain of the Calhoun, I would have re-

garded it as my duty to cut my boat's line and back her out, when I saw the collision was inevitable. The Calhoun had no time to cut off and leave when I saw her captain stamped his foot.

Cross-examined for H. Wright:

I had moved the Celuta an hour before I saw the Harry Wright come alongside the Merrimac. The Harry Wright had been there
86 about a quarter of an hour before they blew the whistle on the Merrimac for the Calhoun to come up. The Harry Wright was attached to the Merrimac on the port side. When I first saw the Harry Wright alongside of the Merrimac, the two were a good half mile below the Celuta, at anchor outside the bar. A pilot was in command of the Celuta; we conferred together and agreed what we could do. I obeyed nobody's order. Just as the Merrimac was coming over the bar in tow of the Calhoun and Harry Wright, we commenced working; as I remarked to the pilot, the water was getting high and we might get in. The ship was aground and we could not move her. I did not move her bow or stern a little to the eastward or to the westward; we could not budge her. Had our vessels been in a direct line south of the buoy we would not have been more than 30 or 40 feet from it, and had they been in a direct line east of the buoy there would have been hardly room for the Gladiator to pass. The Celuta stood 12 or 13 feet above the water, bulwarks and all. I was standing on the boiler-deck,
87 amidship, on the port side between the pilot-house and cabin, when I made these observations. On the line on which the Merrimac came towards the Gladiator from the point where she had been at anchor, there was no good water but perhaps better than where we were; perhaps 3 or 4 inches better. There are no mud-lumps in that tract, but the bar is lumpy. Had the Merrimac struck on a mud-lump, she would have made a sheer, and she made no sheer. A vessel sometimes sheers when she strikes a mud-lump; sometimes she don't.

Redirect:

I did not observe any sheer when these vessels were coming towards us; had they made a sheer, I would have seen it. My attention was particularly drawn to these vessels for the reason that if the Merrimac had gone over the bar, I could have taken the Celuta in. My attention was thus particularly drawn to these vessels from the time they first started to the time of the collision. I am positive that there was
88 no deviation—no sheer. The boiler-deck of the Switzerland where I was standing completely overlooked the boiler-deck of the other two vessels, so that I had a fair view of the vessels that were coming.

Recross:

The Celuta drew 15½ feet at the time; that's what her captain said; and the Harry Wright I don't know, but suppose to be 6 or 7 feet.

(Signed) MARTIN DAVIS.

Sworn to and subscribed before me this 25th March, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

AUGUSTUS ROUYER, being first duly sworn, says:

I am carpenter on board the Switzerland; I was working at the time of the collision at the forward part of the Switzerland, on the main deck, at the bulwarks. I had my head in a downcast position, when I heard a noise of the steam. I *rose* my head up and *who* should I see but the bow of the Merrimac right over me. I heard the noise

89 of the Gladiator; I afterwards went on board of her and saw that her cabin, steam-drums were broken. The cause of this damage was the Calhoun running into her. I saw the Calhoun run into the Gladiator. I did not see the vessels approaching, as I was working at the time. I did not feel a shock when the vessels came in collision.

Cross-examined:

My attention was attracted by the noise of the steam. I felt no shock. The Switzerland and Celuta touched each other; they were as closely tied to one another as they could be. I did not see the vessels come in contact; when I heard the noise of the steam escaping, I saw that they were in contact.

Cross-examined for Harry Wright:

I don't know how high the Switzerland stands out of the water. Don't know how high the Celuta stands out of the water. The main-deck of the Celuta is higher than the Switzerland. The Switzerland, I think, was working her engines at the time I raised my head; I am not sure. The vessels were working after I came from dinner.

90 We take dinner at 12 o'clock; sometimes a little after. Always take an hour after dinner.

Redirect:

The boiler-deck of the Switzerland is exactly 13 feet higher than the main-deck of the Switzerland. The boiler-deck of the Switzerland is higher than the main-deck of the Celuta; it overlooks the main-deck of the Celuta two or three feet.

(Signed) AUGUSTUS ROUYER.

Sworn to and subscribed before me this 25th March, 1867.

(Signed) CH'S CLAIBORNE.
U. S. Comm'r.

Order fixing cause for trial.—Extracts from minutes of 11th May, 1867.

ECLIPSE TOW-BOAT CO. }
vs. } No. 8687.
S. S. MERRIMAC & ALS. }

On motion of Buchanan and Gilmore, esq's, proctors for libellants, it is ordered that said cause be assigned for hearing on Thursday, 23d instant, at 11 o'clock a. m., and that the claimants be notified hereof.

91 *Notices of trial.—Issued May 11th, 1867.*

United States district court, district of Louisiana.

ECLIPSE TOW-BOAT CO. }
vs. } No. 8687.
STEAMSHIP MERRIMAC & ALS. }

To Sullivan, Billings & Hughes; Horner & Benedict; and H. D. Stone, esq's:

You are hereby notified that the above cause has been assigned for trial on Thursday, the 23d day of May, 1867, at 11 a. m.

By order of court:

New Orleans, May 11th, 1867.

[SEAL.] (Signed) K. LOEW,
D'y Clerk.

Marshal's return.

Received, May 14th, 1867, and on the 15th day of same month and year served a copy of the within notice on E. C. Billings, esq., and W'm S. Benedict & H. D. Stone, esq's, each personally.

New Orleans, May 18th, 1867.

(Signed) M. EGAN,
D'y U. S. Marshal.

92 *Testimony for Calhoun.—Filed May 18th, 1867.*

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC AND STEAM TOW-BOATS CALHOUN & HARRY WRIGHT. } No. 8687.

Testimony on behalf of claimants of Calhoun, taken before Ch's Claiborne, U. S. comm'r this 18th May, 1867, in presence of H. D. Stone, proctor for Calhoun; and Edw. C. Billings, proctor for Merrimac.

JAMES P. JACKSON, being first duly sworn, says:

I am captain of the steam tow-boat Calhoun and was so at the time of the collison with the Gladiator on the 11th January, 1867. The Calhoun was engaged at the time in assisting the Merrimac in over the bar; she was lashed to the Merrimac. She was under the command of the pilot of the Merrimac, who had entire control of the three vessels, the Merrimac, Calhoun, and Harry Wright. Amos
93 Towne is the name of the pilot. The Calhoun was lashed to the Merrimac, in order to keep her straight. The Merrimac had motive power enough, but she was there to keep her straight. The distance between the Gladiator and the wreck, as far as I can judge was from 160 to 200 feet. There would have been 10 or 15 feet each side the 3 vessels, had they been kept straight. The sheering of the Merrimac was the cause of the collision. The sheering was occasioned by the bottom of the Merrimac touching aft. I discovered there was danger of a collision about five minutes before it took place. I immediately cut loose from the Merrimac, backed my engine, and hallo'ed to the pilot of the Merrimac, Amos Towne, to back his engine. The pilot of the Gladiator could see where we were trying to go and he could easily have got out of the way had he felt disposed to or had tried it. He did not try to get out of the way. He did not have time to get out of the way after he saw there was danger of a collision. I did all in my
94 power to prevent a collision. I am a licensed river-pilot. I have been on the river in different capacities for 25 years, and a master-pilot 10 years. I am well acquainted with the river at that point. There are lumps on the bar at that point of the river where the collision took place. It was not possible for me to prevent the collision without disobeying the pilot who had charge of the Merrimac. The Merrimac's course was altered 2½ points by the compass by the sheering. We were going at the rate 3½ or 4 miles an hour. The business of the Calhoun is that of a regular tow-boat, and she was so engaged at the time of the collision. The tonnage of the Calhoun is 340 tons. The three boats from the time they started to the time of the collision were moving about half an hour. The wreck had water enough over it so that the Harry Wright could have gone over it and so make the channel wider.

(Signed) JAMES P. JACKSON.

Sworn and subscribed before me this 18th May, 1867.
(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

95 *Testimony for Calhoun.—Filed May 20th, 1867.*

ECLIPSE TOW-BOAT COMPANY
vs.
S. S. MERRIMAC & ALS. } No. 8687.

JAMES P. JACKSON, recalled and cross-examined by proctor for libellants, in presence of E. C. Billings, proctor for S. S. Merrimac, & H. D. Stone, for tug-boat Calhoun, says:

We made fast to the Merrimac between 9 and 10 o'clock in the morning, and attempted to cross the bar at about 10 o'clock that same morning; it was the first attempt the Merrimac made to cross the bar to my knowledge; we came down on that morning to the bar, and the Merrimac was lying at anchor outside of it; the collision took place immediately after I cut the ropes from the Merrimac; I backed outside the bar, came back, and asked Capt. Davis if anybody was hurt, and
96 if I could be of any assistance; after that the Merrimac backed out clear of the bar, with the assistance of the Harry Wright; I left her outside the bar, and don't know how she came in; I am acquainted with that bar; there were vessels aground on the bar at that time; the main channel of the bar is supposed to be 300 feet in width; there are other channels by which vessels of less draught can come in; the wreck that I have spoken of in my direct examination is on the outside of the main channel; that wreck is supposed to be one of the old dry-docks that were sunk there; the main channel is altogether to the westward of this wreck, but there is equally as good a channel to the eastward; I mean that there is equally as great a depth of water to the eastward, but the width of the channel is greater to the westward than to the eastward; the main channel, to the westward of the wreck, is at least 300 feet in width; I presume there was at least 16 feet of water
97 in the main channel at the time; to the eastward of the wreck there were also 16 feet of water for one hundred feet; there was a vessel aground to the southward of the wreck—a little to the eastward; the ship Celuta, that the tow-boats Gladiator and Switzerland had in tow, was aground to the southward of the wreck, and to the eastward; the Gladiator was at least 250 feet from the wreck; judging from the Celuta's jibboom, she was from 160 to 200 feet from the wreck; I may have been fifty feet from these vessels when I first saw that there was danger of a collision; I immediately backed my engine and cut the ropes, but that did not prevent the Calhoun to run into the Gladiator; the moment I backed, I hallo'ed to the pilot of the Merrimac to back his engine, that we were going into the vessel; my boat suffered no damage from the collision; I did not remain by the Merrimac, because I could do better business by going out to sea to look for another ship.
98 The charge for assisting a vessel over the bar is $100 00. The Merrimac did not pay me anything for my services on that occasion; I was only entitled to pay in case I had crossed her over the bar, and having not done that, I did not present her my bill; had I got her over, I should have charged her for that.

(Signed) JAMES P. JACKSON.

Sworn to and subscribed before me this 20th May, 1867.
(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

Testimony for libellants.—Filed May 20th, 1867.

ECLIPSE TOW-BOAT COMPANY
vs.
S. S. MERRIMAC AND STEAM TUG-BOATS CALHOUN & HARRY WRIGHT. } No. 8687.

Testimony for libellants, taken before me, Ch's Claiborne, U. S. com'r, this 20th May, 1867, in presence of A. M. Buchanan, proctor for libellants; E. C. Billings, for Merrimac; and H. D. Stone, for tug-boat Calhoun.

99 LOUIS W. PERKINS, being first duly sworn, says:

I am in the employ of the Eclipse Tow-boat Company; I am cashier of the company, and I paid all the bills now filed and numbered in red ink, from 1 to 10 inclusive, of which a list marked No. 11, in red ink, is now also filed; I confirm the certificate at the bottom of No. 11, and I know all those bills mentioned in it were paid by me as cashier of the libellants; I know that all materials and labor contained in bills from Nos. 1, 2, 3, 4, 5, 6, & 7, were necessary to put the vessel in good order, and repair the damages caused by the collision, and that the charges are reasonable, and the usual ones charged; I know that $300, voucher No. 1, for towage is charged by the tug-boat Perry to tow the Gladiator from the bar to the city; both the Perry and Gladiator belong to the said company, and had not the Perry towed the Gladiator, they would have to pay about three hundred dollars for towing her.

100 The price of $300 is the usual charge, and what they would have charged for towing any other boat than the Gladiator. The Gladiator was completely disabled, and the Perry towed her to the city. No. 10, bill of the wages of the officers and crew of the tow-boat Gladiator, from the 11th to the 30th January, is correct; I know they were paid to the captain of the boat, who paid the officers and crew; the period of time for which these wages were paid was the period embraced from the time of the collision to the resumption of the trip of the Gladiator, as tow-boat, during which time she was disabled and undergoing repairs of the damages caused by the collision mentioned in the libel. Bills No. 8 and 9 were paid to the commissioner of this court for taking the testimony of the libellants in this cause.

(Proctors for Calhoun & Merrimac object to bills No. 8 and 9 being put under the head of damages caused by the collision.)

Cross-examined:

101 I know of my own knowledge that the work spoken of was necessary to put the vessel in good order.

(Signed) LOUIS W. PERKINS.

Sworn to and subscribed before me this 20th May, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

No. 1—Filed with testimony of L. W. Perkins, May 20th, 1867.

[Affixed stamp (2 cents) cancelled.]

NEW ORLEANS, *January 18th*, 1867.

Steam tug-boat Gladiator and owners to tow-boat Perry, Dr.

For towage from S. W. P. Bar to city, tons, at $300 00
Approved.
Rec'd payment.

Document No. 2.—Filed with testimony of L. W. Perkins, May 20th, 1867.

[2-cent U. S., affixed and cancelled, stamp.]

NEW ORLEANS 31*st January*, 1867.

Steamer Gladiator bought of Leeds & Co., iron-founders.

	Straigh'g & turning pipe & fixing do. to elbow	$10 00
	1 valve & seat for check-valve 18", 75c	13 50
102	Boring casting, turning-valve & seat	10 00
	1 cap, 16", 8c. $1 28; patterns for do., $2 00	3 28
	Boring & fitting valve, $5 00; boring pump, $15 00	20 00
	4½-in. copper bolt	4 00
	1 brass hand-wheel turned & milled	6 00
	1 pin turned to fit do	2 00
	Drilling bracket for do	1 50
	18 ⅝ bolts, 2f., $4 50; 1 follower-bolt, turned & chased, $2 00	6 50
	1 socket wrench	3 00
	3 brass nuts, bored and turned	3 50
	2 steel tapered-pins, bored and turned	5 00
	1 brass rod, 1 piston, 1 follower, and 3 rings, 24", 75c	18 00
	Patterns for do	4 00
	Boring, turning, & chasing do	40 00
	1 iron ring for thrust collar	3 00
	Turning t'rust-collar and ring	16 00
	Fitting on do	12 00
	10 ⅝ screw-rivets for do	2 00
	1 iron nut for valve-stem, and valve-stems fitted to do	6 00
	1 ⅞ bolt for boiler turned	2 50
	Gims joints " "	2 50
	1 key for cross-head	1 00
	Cartage	1 00
	6 glass tubes	6 00
		$202 28

(Signed) JACOB SCHULTZ.

Document No. 3.—Filed with testimony of L. W. Perkins, May 20th, 1867.

103 NEW ORLEANS, *Feb'y 1st*, 1867.

Steamer Gladiator and owners to D. Graham, Dr.

Jan'y 21st. To work done, as per contract..... $500.

Rec'd payment.

D. GRAHAM.

Ac. damage on bar.

NEW ORLEANS, *Feb'y 16th*, 1867.

Steam tug Gladiator & owners to D. Graham, Dr.

[U. S. stamp attached and cancelled.]

1 bar 3½ & ½ iron, & spikes for guard facing, 108 lbs., @ 20c....		$21 60
Drayage.....		1 50
		$23 10

Rec'd payment.

D. GRAHAM.

Ac. damage on bar.

Document No. 4.—Filed with testimony of L. W. Perkins, May 20th, 1867.

NEW ORLEANS, *January*, 1867.

Steam-tug Gladiator to Daniel and Ja's D. Edwards,

Dr.

[2c. U. S. stamp attached and cancelled.]

	21.	½ day's time of Noonan on board.....		$3 00
104	22.	½ day's time of Meehan and helper on board.....		4 00
	23.	Hauling two loads to Leeds & Co., $1 00.....		2 00
	24.	⅚ day's time Dennis and helper on board...	5 50	
	"	½ day's time Paul and helper.....	4 50	
		Drayage to boat.....	1 00	
				11 00
	25.	6 lbs. new copper pipe and stem on old pipe, 90	4 50	
	"	Cutting off old pipe, making & bronzing one cross-joint, and fitting sleeve.....	3 50	
	"	Turning out old cast-iron flange.....	1 00	
	"	37 lbs. new copper pipes, 33.....	33 30	
	"	2 new copper steam-*guage*' with new sleeves, & bending pipes, 3 25.....	6 50	
		Drayage.....	1 00	
	"	Drayage on articles from Leeds & Co.....	1 00	
				51 70
	26.	1 new key, & nuts in old cock.....	2 25	
		6 wood screw bolts, 30.....	1 80	
		1 brass oil-globe & cocks	22 50	
		Chasing threads on same.....	75	
				27 30

	"	2 ⅜-inch sleeves, 15	30	
	"	Bronzing copper flange on ½ pipe	1 00	
	"	Fitting brass bush on oil-globe	1 50	
	28.	6" 3 & ⅜-inch wood screws, 30c	1 80	
	"	6 India-rubber-gum nuts	1 25	
	"	1 ¼-inch nipple, & fitting old valve	50	
	"	6 ½-inch elbows, 15	90	
	"	6 ⅜-inch elbows, 20	1 20	
	"	14½ feet ⅜-inch iron pipe, 18	2 61	
	"	6 brass pins, 75	4 50	
105	"	5 feet ¼-inch gass-pipe, 15	75	
	"	21 lbs of copper exhaust-pipe, 90	18 90	
	"	1½ days' time of Lather on board, 5 50	8 25	
		Drayage	1 00	
				41 66
				143 66

(Signed) JACOB SCHULTZ.

1867.

Jan'y	29.	Am't bro't forward		$143 46
	"	17½ lbs. new copper pipe-flanges and sleeves, in 2 copper pipes, 90	15 75	
	"	Making & bronzing 2 cross joints old to new pipes, 2½ inch	5 00	
	"	Boring out 2 old flanges for sleeves	2 00	
	"	2 ¼-inch sleeves, 20	40	
	"	14½ feet ¼ inch gas-pipe, 15	2 18	
	"	12 lbs. pure India-rubber packing, 1 25	15 00	
	"	2 quires emory cloth	2 00	
	"	9 lbs. soft solder, 80	7 20	
	"	1½ cotton rope, 1 25	1 88	
	"	2 drayages	2 00	
	"	1 day's time coppersmith and helper on board	7 50	
				60 91
	30.	2 lbs. copper wire, 1 25	2 50	
		2 dozen screws for *guages*, 40	80	
		¼ day's time of Casey & helper, 7 50	1 88	
		½ day's time of Lowe hanging *guages*, 6 00.	3 00	
		Drayage	1 00	
				9 18
	31.	1 copper *guage*-leak box	6 50	
	"	10 feet of ⅜-inch copper pipe, 60	6 00	
				12 50
				$226 05

CR.

	25.	By 91 lbs. old brass, 14	12 74	
	"	" 3 " copper, 21	63	
	29.	" 7 " " 21	1 47	
106	30.	6 ⅜-inch elbows returned, 20	1 80	
	"	2 ½-inch elbow returned, 15	30	
				16 94
				$209 11

[2c. U. S. stamp affixed & cancelled.]

Feb'y 19th. Paid on ac., 200 00.
March 30th. Paid balance.
Rec'd pay't.
(Signed) D & J. D. EDWARDS,
Pr. WILLINGTON.

(Written across the face:) (Duplicate.) (Duplicate.)

Document No. 5.—Filed with testimony of L. W. Perkins, May 20th, 1867.

[2c. U. S. stamp affixed & cancelled.]

NEW ORLEANS, LA., *February 11th*, 1867.

Tug-boat Gladiator & owners to John McClean, Dr.

Jan'y 22d. For 20 lbs. wrought-iron circle-pieces for boiler-bed, 25c	$5 00
Jan'y 31st. 8½ days' mechanic, $6	51 00
	$56 00

Rec'd payment.
(Signed) JOHN McCLEAN,
Per OSCAR R. McCLEAN.
(Signed) JACOB SCHULTZ.

Document No. 6.—Filed with testimony of L. W. Perkins, May 20th, 1867.

[2c. U. S. stamp affixed & cancelled.]

107 NEW ORLEANS, *Feb'y 20th*, 1867.

Eclipse Tow-boat Co. to Clements & Parker, Dr.

To repairing damages on steam tug-boat Gladiator, per contract	$1,375 00
To 2 days' extra carpenter work, at $5 50 per day	11 00
" 1 " caulking & furnishing oakum	7 00
"70 feet oak for fender on starboard side, at 8 cts. per foot.	5 60
	$1,398 60

NEW ORLEANS, *Feb'y 2d*, 1867.

Eclipse Tow-boat Co., Cr.

By cash on account of contract	$800 00
Balance due	$598 60
Am't due, balance in full	$575 00

(Signed) CLEMENTS & PARKER.

Document No. 7.—Filed with testimony of L. W. Perkins, May 20th, 1867.

NEW ORLEANS, *Jan'y 26th*, 1866.

To the president of the Eclipse Tow-boat Co.:

SIR: I will agree to paint all the new wood-work that is now
108 being put on the steamer Gladiator to repair damages as follows:
Three (3) coats paint, finished in colors to match old work, and do all glazing that is required for the sum of one hundred and twenty-five dollars, ($125 00.)

Respectfully,
(Signed) CH'S J. HOLBROOK,
Painter, No. 94 Elysian Fields St.

[2c. U. S. stamp affixed & cancelled.]

Rec'd the above amount, one hundred and twenty-five dollars, in full, as per contract.
(Signed) CH'S J. HOLBROOK.

Document No. 8.—Filed with testimony of L. W. Perkins, May 20th, 1867.

[2c. U. S. stamp affixed & cancelled.]

U. S. district court, district of Louisiana.

ECLIPSE TOWBOAT CO.
vs.
S. S. MERRIMAC & STEAM TUG-BOATS CALHOUN & Harry Wright, &c., &c. } No. 8687.

Eclipse Tow-boat Co. Dr. to Charles Claiborne, U. S. Comm'r.

109 For taking testimony favor libellants, March 25th, 1867.. $21 00

Rec'd payment.
(Signed) K. LOEW, *D'y Clerk.*

App'd:
B. & GILMORE, *Att'ys.*

Document 9.—Filed with testimony of L. W. Perkins, May 20th, 1867.

[2-c. U. S. stamp, affixed and cancelled.]

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, CALHOUN, AND HARRY Wright. } No. 8687.

To CHA'S CLAIBORNE, *U. S. Comm'r*:

For taking depositions on behalf of libellants.

Feb'y 8, 1867	$16 50
" 13, "	7 50
M'ch 8, "	37 50
	$61 50

Rec'd payment.
(Signed) K. LOEW, *D'y Clk.*

Approved.

BUCHANAN & GILMORE,
Att'ys.

110 *Document No.* 10.—*Filed with testimony of L. W. Perkins, May 20th*, 1867.

Eclipse Tow-Boat Company.—Portage bill of Steam Tow-Boat Gladiator for January, 1867.

Names.	Occupation.	When eng'd.	When disch'd.	No. of days.	Wages per mo.	Wages paid by eg't.
Jacob Schultz	Master	11	30	20	200	133 35
Theo. Schultz	Pilot	11	19	9	100	30 00
Pat. Burns	1st engineer	11	30	20	150	100 00
Andrew Nelson	2nd engineer	11	30	20	100	66 65
John Campbell	Mate	11	30	20	50	33 35
John Howard	Cook	11	19	9	50	15 00
John Knighthart	Cook	20	30	11	60	22 00
Pat Morrissy	Fireman	11	30	20	45	30 00
James Shea	Fireman	11	30	20	45	30 00
George Spencer	Fireman	11	30	20	45	30 00
James Fey	Deck-hand	11	30	20	30	20 00
Henry Carpenter	Steersman	11	30	20	40	26 65
Charles Lawson	Deck-hand	11	30	20	30	20 00
						$557 00

The above amount of postage is a correct account of money paid to the crew of tug-boat Gladiator during the time she was disabled after the collision on the bar by steamer Merrimac, tow-boat Calhoun, and Harry Wright.

(Signed) JACOB SCHULTZ,
Per THEO. SCHULTZ.

111 *Document No.* 11.—*Filed with testimony of L. W. Perkins, May 20th*, 1867.

Steamer Gladiator ac. sundry repairs.

Jan'y 18th.	1.	Towage to city	$300
31st.	2.	Leeds & Co.'s foundry	202 28
	3.	Graham, boiler-maker	523 10
	4.	Edwards, copper "	209 11
	5.	McLean, boiler-work	56 00
Feb'y	6.	Clements & Parker, joiner & carpenter	1,375 00
	7.	Holbrook, painter	125 00
M'ch 25	8.	U. S. comm'r's clerk, $21	
	9.	" " " $61 50	82 50
	10.	Wages crew from 11th Jan'y to 30th Jan'y.	557 00
			$3,429 99

The above amounts were paid by me for ac. repairs tug Gladiator, as per vouchers attached.

New Orleans, May, 1867.

(Signed) LOUIS W. PERKINS,
25 *Carondelet Street.*

Order of continuance.—Extract from minutes May 23d, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, THE CALHOUN AND Harry Wright. } No. 8687.

112

By consent of proctors for libellants and claimants, ordered that this cause be fixed for hearing on Thursday, 6th June, 1867, at 11 a. m., on evidence to be taken before the U. S. commissioner, Ch's Claiborne.

Testimony of libellants.—Filed May 23d, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, &C., &C.

Testimony for libellants, taken before Ch's Claiborne, U. S. comm'r, May 23rd, 1867, in presence of A. M. Buchanan, proctor for libellants; Aug. De B. Hughes, proctor for Merrimac; and H. D. Stone, for tug-boat Calhoun.

LEWIS W. PERKINS recalled, says:

The period included from the 11th to the 30th of January last inclusive, is that during which the Gladiator was prevented from prosecuting her business of towage, and undergoing repairs from
113 damages occasioned by the collision with the Merrimac and the two tug-boats Calhoun and Harry Wright. I have made an estimate of the loss sustained by libellants in consequence of the Gladiator being laid up during those 20 days, which estimate is at the bottom of the document now produced, filed, and marked "A." Three thousand twenty-four dollars is the loss of the gross earnings of the Gladiator for $\frac{2}{3}$s of the month of January—during which time she was disabled—taking the proportion of all the moneys received for towages by the company to the number of tow-boats employed. The particulars are given in document marked "A." If this boat had been running there would have been more money received, because a great many ships were coming in at that time. I confirm the observation at the bottom of document "A." The average gross earnings of the Gladiator are between six and seven thousand dollars a month. The nett earnings of the Gladiator from the period during which she was disabled,
114 would have been from twelve to fifteen hundred dollars, which the company has lost.

(Signed) LOUIS W. PERKINS.

Sworn to and subscribed before me this 23d May, 1867.
(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

Document marked "A.—Filed with testimony of L. W. Perkins, May 23d, 1867.

Towage ac. Eclipse Tow-boat Co., Jan'y, 1867.

Total amount..... $18,140

Switzerland	$4,535
Leviathan	4,535
Gladiator	4,535
Perry	4,535
	$18,140

Gladiator disabled 11th inst.; lost ⅔ month *for* $3,024. The exact deficit cannot be estimated, as by losing one outside boat we lost one portion of the number that arrived.

(Signed) L. W. PERKINS.

Testimony for Merrimac and Calhoun.—Filed May 23rd, 1867.

115 ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC AND STEAM-TUGS CALHOUN and Harry Wright. } No. 8687.

Testimony for claimants of S. S. Merrimac and tug-boat Calhoun, taken before Ch's Claiborne, U. S. comm'r, May 23d, 1867. Present, A. M. Buchanan, proctor for libellants; Aug. De B. Hughes, for Merrimac; and H. D. Stone for Calhoun.

AMOS TOWNE, being first duly sworn, says:

My business is that of a branch pilot, at the mouth of the Mississippi River, piloting all classes of vessels. This was my business in January last; I had a license as branch pilot at that time. I have been a pilot since 1847, and have followed that business constantly since then, except during the war. I am familiar with the channels of the different passes of the river, and also with the currents. I was acting pilot on board the S. S. Merrimac on the 11th of Jan'y last. I had com-
116 plete charge and control of her as pilot, and was in command of her. I recollect the collision occurring between the Gladiator and Calhoun. On the day of the collision arrangements were made with the tug-boats Harry Wright and Calhoun to assist in taking the S. S. Merrimac from anchor outside the bar to bring her over the bar. After commencing from starting from anchorage, we started with low speed, and proceeded on until we entered the channel which we had sounded out. In proceeding up, the order was given to go with more speed. We proceeded steady along up the channel, when suddenly the S. S. Merrimack took a sheer to the eastward; the order was then given to steamboats Harry Wright and Calhoun to stop their boats, at the same time giving the order for all to starboard their helms; finding the vessels did not recover from the sheering, the order was given to stop and reverse the engines. By the time this could have been done the Calhoun struck the Gladiator. The Calhoun then slipped her
117 fasts and backed out. Afterwards we backed, with the assistance of the Harry Wright. I should think the Gladiator was about 200 feet, somewhere between east and southeast from the wreck-buoy. There was no other channel through which the Merrimac could have passed. I had made soundings to that effect, and know this to be the fact. I should judge the breadth of the Merrimac and the two tug-boats to be 90 feet. I had full opportunity to estimate the distance between the wreck-buoy and the Gladiator. I stood on the Merrimac as she was steaming to pass through; I could see the space on either

side, and there was ample room for them to pass. On that day there was about 7 feet water above the wreck. I don't know the draught of the Harry Wright, and can't say whether she could have passed over the wreck. I judge she draws about 6 feet. I think she could have passed over the wreck at the time. It was good seamanship to make the endeavor to pass through. I considered that there was room
118 enough to pass through without the Harry Wright going over the wreck. The collision no doubt was caused by the Merrimac striking some shoal place and sheering. I call such a shoal place a mud-lump. Had it not been for that I would have gone safely through. The Gladiator could have cast off the Celuta at the commencement *that* we started, as she could see the channel we were taking, and thus avoid a collision. All the orders that were given, as stated above, were given by me. I had entire charge of the Merrimac and the tug-boats Calhoun and Harry Wright. The object of taking the Calhoun to tow the Merrimac was to steer her, as she was so much by the stern that her rudder would not act; I mean she would not act well. The Calhoun was taken to assist in keeping the Merrimac straight. The Calhoun had nothing to do with the steering, except by my orders.

Cross-examined:

I think it was a low stage of tide; we had not much tide at that
119 time. The Merrimac was at anchor outside the bar, not over 400 or 500 feet outside. I placed the Calhoun on the starboard side of the Merrimac and the Harry Wright on her port side. The Calhoun is a larger boat and draws considerable more water than the Harry Wright. I put the Calhoun on the starboard side not because she drew more water, but because she was the more powerful boat. I don't think there was water enough over the wreck for the Calhoun to pass. I think the breadth of beams of the Merrimac might be 50 feet. The Calhoun is a side-wheel steamer; I should think her breath to be 35 feet. The Harry Wright is also a side-wheel steamboat. In my opinion, I think the width of the Harry Wright to be 30 feet. I should judge it should have been fifteen minutes from the time we took the Merrimac from her anchorage and started ahead, to the time we came up to the Gladiator. I should think it might be between 10 and 15 minutes. When I first perceived the danger of a collision, I
120 gave the order to the Harry Wright to stop, and to all three to back and reverse their engines. I am not sure that the orders were obeyed. I am sure that they made the answer to starboard. It could not have been a minute between the time the first of these orders was given and the collision. The orders were scarcely given *that* the collision occurred. After or about the collision, the Calhoun cast loose from the Merrimac. We backed out with the Merrimac, went outside and came in the next day. I think this must have been at about two o'clock. I remained on board and piloted her when she came in. We did not come in by the same channel; we came in to the westward of the wreck. I think there was one ship, the Carl, to the westward, when we came in; she was there the day before, but in such a position that there was no chance to come in, either to the westward or eastward of her. We had no tug-boats alongside the Merrimac when we came in the next day. I judge that we touched bottom when we came in
121 the next day, but having more room, we cleared a channel.

Being asked what depth of water there was in the channel to the eastward of the wreck on the 11th of January, when he attempted to come in, says:

There were 13, 13½, 14, 15, & 16 feet, as I ascertained by soundings. I think the Merrimac drew 13 or 13½ feet forward, and 2 feet more aft. Fifteen and a half feet aft was her greater draught. I did not sound the channel that we came in the next time. We had sounded that channel two days previous, and the least water that we found in it was fourteen and fourteen and a half feet, and from that up to 16, 17, & 18 feet. I had not brought in before, by that channel east of the wreck-buoy, vessels of the class of the Merrimac. When I started to go in by the east channel, I did not steer directly for the wreck, but kept a little on the bow. I did not head directly for the Gladiator. I headed for the Gladiator only when the Merrimac took the sheer and not before. The wreck, as I headed, was on our port bow, and
122 the Gladiator on our starboard bow. Before the Merrimac took the sheer, I was on the top of the ship's cabin, on the forward part of the wheel-house, when we attempted to pass. I think we must have been going about 3 knots an hour at the time the collision occurred.

Redirect:

I am sure that I did not head for the Gladiator until the vessel took this sudden sheer. There was a lump between the Gladiator and our vessel that prevented us to head for the Gladiator, but I was not aware of it until I touched it. That lump was the cause of the sheer. I judge she must have sheered 2½ or 3 points. There was no disobedience of my on the part of the Calhoun. I don't think that there was any fault on the part of the Calhoun for this collision. There would have been no difficulty in taking the Merrimac drawing 15½ feet aft over thirteen feet water with the ordinary mud of the river, if it had not
123 been for the lumps, *in* which the water is shallower.

(Signed) AMOS TOWNE.

Sworn to and subscribed before me this 23d May, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

EDWARD BEALS, being first duly sworn for the Merrimac and Calhoun, says:

Previous to this war I was in command of a steamboat; since then I have been a river-pilot in the Star line. I am familiar with the passes and channels of the river Mississippi. I was on board the S. S. Merrimac on the morning of the 11th of January last. On the 10th Capt. Van Sice invited me to go down the bar with him, and I went on the morning of the 11th. Mr. Amos Towne sounded the bar in my presence. He found 13½ feet the least water; 14, 15, & 16 feet to the east of the wreck. He concluded he could take the ship through that channel with the assistance of the two tow-boats to assist in
124 steering the Merrimac over the bar. While he was sounding he could see that there was not room enough between the Carl and the wreck for him to pass through, and there was not water enough to go to the west of the Carl. He therefore concluded that that channel was the place to go through with the ship. The two boats made fast to the Merrimac and got under way. I heard the pilot say that was the channel to go in as there was no other. He went up slow on entering the channel. After that I don't know what the speed of the Merrimac was. We went up very nicely in the channel. It was impossible to steer for the Gladiator, as there was shoal water between her and

the entrance of the channel. After we were in the channel the direction of the Merrimac was between the Gladiator and the wreck-buoy, and the wreck-buoy a little on the port bow. She was going along very nicely till she suddenly sheered, and the pilot sung out, "Hard astarboard," and hallo'ed to the Harry Wright to stop and back her
125 engine. She still kept sheering. He also sung out at the same time, "Hard astarboard," to the Calhoun. During that time, when she sheered, she sheered 2½ points, and the pilot sung out to stop and back her. I was standing in the pilot-house looking at the compass. I noticed that she fell off two points and a half. The orders of the pilot were promptly obeyed. The order to stop and back was obeyed as promptly as it was possible. Before the order could have its effect the collision occurred. The cause of this collision was the Merrimac striking a mud-lump and sheering. There was no other channel by which the Merrimac could have gone up than the one Capt. Towne chose. That was a feasible and proper channel, with the ordinary bottom of the river—a vessel drawing 15½ feet aft, with the power applied to the Merrimac, 13½ feet was a sufficient depth of water. I think it was good seamanship to attempt to pass the Merrimac there. I have seen the S. S. Crom-
126 well, drawing 15½ go by the same channel. I think that the distance between the wreck-buoy and the Gladiator was 185 to 190 feet. The Merrimac, outside of all, is 40 feet; the Calhoun, I think, 45 to 48 feet, and the Harry Wright, I think, from 35 to 38 feet. I was not paying as particular attention as the pilot to the distance, but I was to the steering and the compass. I had a clear opinion of the distance between the wreck-buoy and the Gladiator, and I think there was ample room for the Merrimac and her tug-boats to pass through. I think there were from 7 to 7½ feet water over the wreck at that tide. I think the Harry Wright draws 6½ feet. Capt. Schultz told me that he knew there was abundance of water for the Harry Wright to go over the wreck. There was room enough between the wreck and the Gladiator for the Merrimac and tug-boats to pass. As the vessels were aiming, before the time the Merrimac took the sheer, they would have passed between the wreck and the Gladiator, but the sheer made us fall off two points and a half.

Cross-examined:

127 Being asked whether any vessels could steer when her keel is 2 feet deep in the mud, going through the bar, says:

Yes, I have seen vessels steered when so placed.

Being asked whether the rudder of a ship does not come down as far as the bottom of her keel, answers:

No, not by three or four inches.

(Signed) his EDWARD + BEALS. mark.

Sworn to and mark affixed, before me, this 23d May, 1867.

(Signed) CH'S CLAIBORNE,
U. S. Comm'r.

Note of evidence.—Filed June 6th, 1867.

ECLIPSE TOW-BOAT CO. vs. S. S. MERRIMAC, &C. } 8687.

Libellants offered in evidence the testimony taken in their behalf before U. S. comm'r on 9th & 13th Feb'y, and 8th March, 1867.

128 *Order.—Hearing and continuance. Extract from minutes, June 6th, 1867.*

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, ST'R CALHOUN, AND ST'R Harry Wright. } No. 8687.

This cause came up for trial—Buchanan and Gilmore for libellants; Sullivan, Billings and Hughes for the Merrimac; H. D. Stone for the Calhoun; Hornor & Benedict for the Harry Wright.—

When, after hearing the pleadings and evidence in part, the cause is continued till to-morrow at 11 a. m.

Note of evidence.—Filed June 7th, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, &C. } No. 8687.

Libellants offered the testimony taken before U. S. comm'r on the 25th March, 20 and 23d May, 1867, and the vouchers therein
129 referred to.

Claimants offered the testimony taken before the U. S. comm'r on 21st February, 1867, and 18th & 20th May, 1867, and the certificate from the secretary of state.

Certificate of secretary of state offered in evidence by claimants, and filed June 7th, 1867.

STATE OF LOUISIANA,
OFFICE OF THE SECRETARY OF STATE,
New Orleans, May 21st, 1867.

I, J. H. Hardy, secretary of state, do hereby certify that Amos Towne was appointed and commissioned branch pilot, and of the board of examiners for the port of New Orleans, on the 23d day of March, 1866, and that his commission has not been revoked.

Given under my hand and seal of the State, at the city of New Orleans, this 21st day of May, A. D. 1867, and the independence of the United States the 91st.

[SEAL.] (Signed) J. H. HARDY,
Secretary of State.

130 *Hearing and submission.—Extract from minutes of June 7th, 1867.*

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, &C., &C. } No. 8687.

This cause came up, agreeably to continuance—

Buchanan and Gilmore for libellants, Sullivan, Billings and Hughes on behalf of the claimants—

When, after hearing further evidence and argument of counsel, the court took time to advise, and granted leave to the claimants to furnish their authorities within three days.

Order to furnish briefs.—Extract from the minutes of July 1st, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, ST'R CALHOUN, AND HARRY WRIGHT. } No. 8687.

Ordered that the proctors of the respective vessels libelled in
131 this case do within 3 days furnish briefs in regard to the liabilities of a pilot in charge of a vessel.

Brief of S. tug Harry Wright.—Filed July 3d, 1867.

ECLIPSE TOWBOAT COMPANY
vs.
ST'R MERRIMAC, AND TUG-BOATS CALHOUN AND HARRY WRIGHT. } No. 8687.

United States district court. Brief for tug-boat Harry Wright.

1st. The evidence shows the Harry Wright to have been lashed to the st'r Merrimac, on the side remote from the Gladiator.

2d. That she could pass over the wreck without touching.

3d. That she was exclusively under the control of the officers and pilot of steamer Merrimac.

4th. That she obeyed orders at moment the sheer was taken, by steering and commenced backing.

5th. That no fault or negligence is proved against the Harry Wright, and there should be no recovery against her for the collis-
132 ion, and her small fee for aiding the ship to cross the bar does not make her an insurer for the benefit of third parties.

We beg to refer your honor to the opinion of Mr. Justice Clifford, reported in 24 Howard, p. 117, in which that learned judge says:

"Cases arise undoubtedly when both the tow and the tug are jointly liable for the consequences of a collision, as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, and are guilty of negligence in their navigation. Other cases may be imagined when the tow alone would be responsible, as when the tug is employed by the master or owners of the tow, as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and man-
133 agement of the master of the tow. Fault, in that case cannot be imputed to the tug, &c."

We respectfully submit that, under the evidence, the Harry Wright cannot be held liable.

As to the liability of pilots.

It is in evidence that a regularly-licensed pilot, competent and trustworthy, was in charge of the Merrimac and the two tugs. That, under the laws of Louisiana, acts 1855, p. 372, pilots are duly licensed and commissioned by the governor. That, by our State laws, if pilots are not taken by vessels about to enter a harbor, said vessels must pay half pilotage, and by custom, forfeit their insurance in case of accident, thus making it a compulsory duty on the part of vessels to receive pilots, and give to them charge of the ship.

In Flanders' work on shipping, page 410, the author refers to the case

of "the Protector" and "the Maria," described by Dr. Lushington,
134 in 1 W. Rob. adm. R., 45 and 95, and says:

"When a person is compulsorily put on board a vessel, and the owner's authority is superseded by legislative enactment, it would be a violation of all justice to hold such owner responsible for the skill, sobriety, and caution of an individual with respect to whom he has no power of selection; whose qualifications he has no opportunity of deciding upon, but which are to be ascertained and determined by others; the owner himself being entirely debarred from any possibility of interference."

It was decided in the "Constitution," Gilpin's R., p. 579, and the "Gipsey King," 2 W. R., ad. R., 537, 542.

Flanders on shipping, p. 416. That "A vessel in charge of a licensed pilot whilst in tow of a steam-tug, is, under ordinary circumstances, to be considered as navigated by the pilot in charge. If the course pursued by the steam-tug is in conformity with his directions and a collission takes place, the pilot is responsible, and not the owners of the vessel or of the steam-tug.

135 We respectfully submit that the libel as to the Harry Wright should be dismissed.

(Signed) HORNOR & BENEDICT,
Proctors.

Order for further argument.—Extract from minutes of Dec'r 3d, 1867.

ECLIPSE TOW-BOAT COMPANY
vs.
S. S. MERRIMAC, TOW-BOAT CALHOUN AND Harry Wright. } No. 8687.

Ordered that further argument be had in this case, on Wednesday, 11th inst., at 11 a. m., and that the respective proctors be notified thereof.

Notices of trial.—Issued December 3d, 1867.

United States district court, district of Louisiana.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, TOW-BOAT CALHOUN AND Harry Wright. } No. 8687.

136 To Sullivan, Billings and Hughes, H. D. Stone, Buchanan and Gilmore, & Horner & Benedict, esq's.:

You are hereby notified that the above cause has been assigned for trial and further argument, on Wednesday, the 11th day of December, 1867, at 11 a. m.

By order of court.

New Orleans, December 3d, 1867.

[SEAL.] (Signed) K. LOWE, *D'y Clk.*

Marshal's return.

Received December 24th, 1867, and on same day of same month and year, served a copy of the within notice of trial on Sullivan, Billings

and Hughes, in the hands of E. C. Billings, a member of said firm, personally, at 82 Custom-house street; on H. D. Stone, in hands of Jno. Smith, his clerk, at office 57 Royal street, in this city; on Buchanan and Gilmore, served on A. M. Buchanan, a member of said firm, personally, at office 129 Gravier street in this city; and a copy also served on Hornor & Benedict, left in hands of F. W. Baker, at their office 18 Carondelet street, in this city.

137 New Orleans, Dec'r 5th, 1867.

(Signed) J. W. REED,
D'y U. S. Marshal.

Order of continuance.—Extract from minutes of December 11th, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, &c. } No. 8687.

By consent of counsel the argument in this case is postponed till the 23d instant at 11 a. m.

Hearing further argument and submission.—Extract from minutes of December 24th, 1867.

ECLIPSE TOW-BOAT CO.
vs.
S. S. MERRIMAC, ST'R CALHOUN, AND HARRY Wright. } No. 8687.

This cause came up pursuant to the order of 3d instant—Buchanan and Gilmore for libellants; Sullivan, Billings and Hughes for the
138 Merrimac; H. D. Stone for the Calhoun; and Hornor & Benedict for the Harry Wright—
When, after hearing further argument, the court took time to consider.

Brief for tug Harry Wright.—Filed December 24th, 1867.

ECLIPSE TOW-BOAT CO.
vs.
ST'R'S MERRIMAC, CALHOUN, AND HARRY Wright.

United S. district court. In admiralty. No. 8687. Cause of collision. Brief for tug Harry Wright on the evidence.

The record shows the tug Harry Wright was a side-wheel steamer, drawing from four to six feet water; in the employ of the steamer Merrimac, and lashed to her side most remote from the Gladiator, the vessel injured.

That there was enough water by the wreck buoy to allow the Harry Wright to ride over it with safety.

That the Wright was entirely under the control of the officer of the Merrimac, her employer.

139 That, when the fact became apparent that a collision was about to take place, the Merrimac gave orders to the Wright to commence backing, which order was promptly and on the instant obeyed.

That the tow, the Merrimac, was a large steamer, having on a full

head of steam, and it was this vessel which sheered and caused the Calhoun to collide with the Gladiator.

That the fault, if any existed, was caused solely by the Merrimac, and that there is no evidence adduced, nor fault alleged against the Harry Wright.

Under the facts in the record, we refer your honor to the case of Sturgis vs. Boyer & als., 24th Howard, p. 110, where the court held that "cases arise when both the tow and tug are jointly liable for the consequences of a collision, as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take
140 due care, or are guilty of negligence in their navigation."

"Other cases may well be imagined when tow alone would be responsible, as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management of the master and crew of the tow."

The case before your honor is even stronger than the one quoted in the reasoning of the judge who decided that case.

In this the tug was employed and wholly under the control of a steamer, well manned and officered, with a full head of steam on, and employed merely as an additional motive power to accelerate the speed of the Merrimac over the shoal water on the bar.

Notes in Parsons on Maritime Laws, pp. 208 & 209.

The court held in the case of "The Express," 1st Blatchford's C. C. Rep'ts, when a sailing vessel in tow of a steamer comes in col-
141 lision with a vessel properly anchored, in consequence of the joint fault of the steamer and her tow, they are liable jointly and severally for the damages.

Either may be exempted from liability if it appears that the fault attaches to one exclusively.

The record shows the fault, if any existed, was solely attributable to the Merrimac.

Respectfully submitted.

(Signed) HORNER & BENEDICT,
Proctors for Tug Harry Wright.

Brief on the part of proctors of steamer Merrimac.—Filed December 24th, 1867.

United States district court for the district of Louisiana.

THE ECLIPSE TOW-BOAT COMPANY
vs.
THE STEAMER MERRIMAC, THE TOW-BOAT Calhoun, and the tow-boat Harry Wright. } No. 8687.

Brief on the part of the claimants of the steamer Merrimac.

The libellants have instituted these proceedings to recover for
142 damages which happened to one of their boats, "The Gladiator," in consequence of a collision between her and the tow-boat Calhoun, which boat, together with the Harry Wright, was towing and lashed to the Merrimac at the time of the collision, the Merrimac being an inward-bound vessel.

The evidence shows uncontradictedly that the Merrimac was, at the time of the collision, under the control of a duly licensed pilot, who was the first duly licensed pilot who offered himself, to whom the entire command of the Merrimac and the two tug-boats was surrendered, and who gave all the orders to all three of the vessels, which orders were promptly and implicitly obeyed. If, therefore, there was any fault on the part of the libelled vessels, it was the fault of the pilot, whom, by law, they were compelled to take.

I. The statutes of Louisiana compel an inward-bound vessel to employ the first duly-licensed pilot, by imposing the liabilities of paying to the pilot so offering half pilotage; and, further, that when any vessel inward-bound shall employ as a pilot one not duly licensed, where
143 one duly licensed has offered, shall forfeit the sum of one hundred dollars, ($100,) with privilege to be recovered in the name and for the benefit of the Charity Hospital of New Orleans.

See acts of 1859, No. 74, p. 57, sect's 394, and acts of 1864 & 1865, No. 56, p. 166, sect. 12.

Thus, then, the laws of this State, in case of refusal to take the licensed pilot offering, impose (1) in the nature of a penalty half of the pilotage to be paid to the pilot, and (2) impose a penalty of one hundred, ($100,) to be recovered by the Charity Hospital of New Orleans.

II. Had there been simply the payment of half pilotage exacted by the statute in case the pilot duly licensed is refused, this alone would have exonerated the owners employing the licensed pilot first offering.

By a long course of decisions in England, under the Liverpool pilot act, it has been settled that, where, under that act, a pilot has been employed who was duly licensed, and was the first offering, the
144 owners were exempt from liability. (The Montreal, 24 E. L. & E., 580, i; The Maria, 1 W. Rob., 95, i, 105, 108, 110, 111, & 112; The Agricola, 2 W. Rob. 10, i, 15, 20; the Supreme Court of the United States in Smith v. Condry, 17 Peters, 20.)

S. C., 1 How., R. 28, held that, where, in the harbour of Liverpool a collision occurred, the vessel in fault being under the charge of a licensed pilot on board, whom, by the terms of the Liverpool act they were obliged to take, the owners are not responsible. (See, also, 1 Parsons on Maritime Law, p. 486, and notes.)

C. J. Taney, in the case last cited, p. 24, and Professor Parsons, p. 486, rest the discharge of the owners from liability, on the ground of the 25th sect. of Liverpool act. And this section*al* is identical with the Louisiana statute, except that Liverpool act provides that in case of refusal to employ the pilot, the vessel shall pay to him full pilotage, while the Louisiana statute provides that the vessel shall pay to
145 the pilot whose services are refused half pilotage. (See, also, the Corolus, i, 2 Curtis, C. C. R., 69, and the condensed statement given in Parsons on Maritime Law, p. 486. Note.)

It is submitted that, as a question of law an' authority, this provision of itself discharges the claimants from all responsibility, they having placed the steamer under the sole charge of the first offering licensed pilot.

III. But the statute of Louisiana contains an additional provision. It subjects a vessel employing any but a licensed pilot, when a licensed pilot has offered his services, to what is in terms and in fact a penalty of one hundred dollars ($100.)

The acts of 1864, 1865, No. 56, p. 156, sec. 12, provides that if any vessel inward bound or outward bound shall employ as a pilot one not licensed, where a licensed pilot offers, the said vessel, her captain, and

owners, shall forfeit the sum of one hundred dollars, ($100,) and to be recovered by the Charity Hospital of New Orleans.

146 Here, then, is a penalty imposed for not taking the pilot. If the law has said, take this pilot or suffer a penalty, there can be no doubt that the taking of that pilot is compulsory, and, being compulsory, the owners are exempt.

IV. But if these authorities should fail to satisfy the court that the owners of the three vessels, Calhoun, Merrimac, and Harry Wright, are, by reason of the fact that the pilot under whose charge they were at the time of the collision was selected by the law, by its having imposed not only the liability of half pilotage, but the further penalty of one hundred dollars, ($100,) were exonerated from responsibility, there still remains a ground of exemption for the owners of the Merrimac alone, in this, that she had also attached to and on either side of her a tug-boat hired and paid by her to steady and guide her over the bar, and to prevent any such accident as that out of which this suit arose.

147 For it cannot be that, as between these three libelled vessels, the Merrimac can be held responsible for a collision for the very prevention of which the other two *implied* by it, not expressly contracted, and with which she was connected only in that she was lashed to the colliding tug-boat, "the Calhoun."

V. The libel should be dismissed at the cost of the libellants.

(Signed)

SULLIVAN, BILLINGS & HUGHES,
Proctors for Owners of Merrimac.

Brief for libellants.—Filed December 24th, 1867.

ECLIPSE TOW-BOAT COMPANY
vs.
STEAMSHIP MERRIMAC AND TOW-BOATS CALHOUN and HARRY WRIGHT. } No. 8687.

District court of the United States, district of Louisiana.

Brief of libellant.

1st. The court having required an argument on the point of the liabilities of the owners of a vessel for damages occasioned by a collis-

148 ion while the vessel has a licensed pilot on board, we will take no further notice of the voluminous testimony in regard to the circumstances of the collision which has given rise to this suit than to say that it entirely absolves the master and crew of the Gladiator from any fault, and shows that the collision was, beyond all question, the fault of those on board the Merrimac and the two tow-boats attached to her. The facts of this case are almost identical with those of the case of "The Stalwart," No. 7461 of the docket of this court, decided by Mr. Justice Campbell in 1859, in which case the owners of the Stalwart were held liable. And in those particulars in which the present case differs from that of the "Stalwart," the difference will be found to be against these claimants, and particularly against the Merrimac; for the Stalwart was a sailing vessel, while the Merrimac was not only a steamer of great power, but had engaged two steam vessels, in

149 addition to her own steam, in order to force her through the mud upon a bar where there were several feet of water less than her draught.

See deposition of Amos Towne, witness for claimants, taken May 23d, 1867.

If, as the witnesses of claimants declare, there was plenty of room for the three steamers to pass between the sunken wreck and the Gladiator and if the collision was the result of a sheer, when the Merrimac touched bottom, is it not evident that such sheer was a very natural and perhaps inevitable consequence of the keel or rudder of the Merrimac becoming imbedded in the mud upon the bar? We contend, therefore, that there was fault, and neglect, disregard of the safety of the "Gladiator" on the part of the commander of the Merrimac in engaging towage, and of the commanders of the two tow-boats engaged, as well as fault on the part of the pilot who undertook to carry the Merrimac in, under the circumstances; and the very authorities quoted by counsel of claimants say, that when there is fault of the master of the vessel as well as
150 of the pilot, the owner is liable. The captain of the Merrimac is also to blame for having attempted to cross the bar, while the ship Celuta was aground upon it with the Gladiator and Switzerland tugboats alongside of her. The Merrimac might and should have come to anchor outside, until the bar was clear, which the evidence shows was the next day. But he preferred to run the risk of collision by crossing a crowded and obstructed bar with insufficient depth of water which was the direct cause of the collision.

2d. The claimants contend that they are not liable for the collision because there was a licensed pilot on board, and they quote in support of this position the following English cases: The Montreal (24th E. L & E. Rep., 580;) The Maria (1 W'm Rob., 95;) The Agricola (2 C. W. Rob., 10;) The Protector (1 W'm Rob., 45;) and the learned counsel have cited two American cases, which they contend affirm the doctrine of the above-mentioned English cases, viz: Smith vs. Condry (1st How.,
151 28;) and the Carolus (2 P. Curtis Cist. A. R., 69.) All the English cases cited are decisions upon certain local statutes, and the case of Smith vs. Condry, 1st How. merely recognizes the English rule as governing in the case at bar, because the collision occurred in an English port. The court therefore took a review of the English cases which they found to be contradictory, but that the latest doctrine was that of Dr. Lushington in the admiralty court in the case of "The Protector," &c.

But on the other side it may be said that in the first of those cases, "The Protector," Dr. Lushington directly annulled the decision of his predecessor, S'r William Scott, in the case of the Neptune 1st Dodson 467, and certainly there is no better authority in maritime law than Sir William Scott. There is also on the same side Sir William Scott, the case of the Attorney General vs. Case, (3 Price, 302.) The case of the Transit commented by Dr. Lushington in the case of "the Pro-
152 tector," and also the Edw' (2d W'm Rob., 442,) in which as well as in the case of "The Protector" Dr. Lushington acknowledges the doctrine of Lord Stowell to have been law from the earliest times and recited the passage of the late English statutes.

The same thing is stated by Judge Curtis in the "Carolus" (2 Curtis C. C. Rep., 69.) See also the cases of Yates vs. Browne (8 Pickering, 23.) William vs. Price (4th Martin's Report U. S., 399.) Bussy vs. Donaldson (4th Dallas Rep., 206.) Smith vs. Creole (2d Wallace C. C., 485,) and other American cases quoted in note 1 to page 484, of 1st Parsons Mar. Law. We particularly call the attention of the court, to the concise, and we think conclusive, reasoning of Chief Justice Parker in the case in 8th Pickering. That very distinguished judge concludes his decision in

these words: "The pilot is indeed put in the place of the master, and there is as much reason for the owner's liability in one case as in the other."

We conclude that the weight of American authority is on our
153 side of the question, and that the owner of the ship is liable for collision taking place with a licensed pilot on board, even when the collision has taken place through the fault of the pilot alone.

But if the court agrees with us on the point of fact, that there was fault also on the part of the commander of the Merrimac, then there is no conflict of authorities, and the liabilities of the owner is unquestioned.

3d. But this plea, however it may avail the Merrimac, on board of which vessel there was a licensed pilot, cannot avail the Calhoun and the Harry Wright. The doctrine contended for by our adversaries is surely not so elastic as to stretch over the decks of three vessels. There was no licensed pilot on board the Calhoun and the Harry Wright; what is more, the L'a statutes of 1859 and 1864, relied on by the learned counsel, did not oblige the two tow-boats to engage the services of a licensed pilot to cross the bar. The three vessels were
154 lashed together, it is true, and they necessarily steered in the same way to prevent confusion; and if, as they say, the two tow-boats received their orders from Am. Towne, the pilot of the Merrimac, this was purely a voluntary act on their part. And your honor has seen that the whole foundation of the doctrine of the owners' exemption from liability is, that the engagement of the pilot is compulsory. The Calhoun tow-boat struck the blow which demolished the Gladiator; and in striking that blow she infringed upon the Gladiator with the united force of the Harry Wright, of the Merrimac, and her own, under the impulsion of a full head of steam. The three parties are, we contend, jointly and severally, responsible for the damages resulting. If one of them, the Merrimac, should be released from liability on account of being in charge of a licensed pilot, at least we must hold the other two vessels.

4th. As to the amount of that damage it is proved by the testimony of the witnesses, Perkins and others, and the documents in evidence, marked No's 1 to 11 in red ink.

155 We pray for judgment in conformity to the prayer of our libel.

(Signed) BUCHANAN & GILMORE,
For Libellant.

Brief for st'r Calhoun.—Filed December 24th 1867.

United States district court.

THE ECLIPSE TOW-BOAT CO.
vs.
THE MERRIMAC, TOW-BOAT CALHOUN, & HARRY WRIGHT.

Brief for tow-boat Calhoun.

1st. The Calhoun not liable for reasons set forth in the brief of att'y for st'r Merrimac.

2d. The Calhoun is not liable because she was but the servant of the Merrimac and under her sole control. Smith vs. The Creole, 2d Wal.

lace, C. C., 485; steam-tug Sampson, 3 Am'r. Law Register, 337. See English cases cited on page 209, Parson' Maritime Law, vol. 1.

(Signed) H. D. STONE,
Att'y to owners of Calhoun.

156 *Brief for Calhoun.—Filed December 24th*, 1867.

United States district court of Louisiana.

ECLIPSE TOW-BOAT CO.
vs.
ST'R MERRIMAC, AND TOW-BOAT CALHOUN, AND Harry Wright. } No. 8687.

Brief in behalf of Calhoun.

The evidence shows that the Calhoun was employed to assist and steady the Merrimac and prevent her from sheering, and not as a regular tow-boat, to tow and furnish motive power to the Merrimac. While thus employed, and while acting under the orders of the pilot of the Merrimac, the Merrimac sheered and caused the Calhoun to collide with the Gladiator.

Is the Calhoun liable for the collision?

1st. We say neither the Merrimac *or* Calhoun are liable because they were in charge of a regular licensed pilot—the first offered. Upon
157 this point we rely upon the argument and authorities cited by the counsel for the Merrimac upon the 2 following pages.

U. S. district court.

THE ECLIPSE TOW-BOAT CO.
vs.
THE STEAMERS MERRIMAC, CALHOUN, AND Harry Wright. }

Authorities on behalf of claimants.

(La. Rev. Stat., p. 404, § 19.) "If the master of any ship or vessel coming to the port of New Orleans shall refuse to receive on board and employ a pilot, the master or owner of such ship or vessel shall pay to such pilot who shall have offered to go on board and take charge of the vessel, half pilotage."

(1 Parsons Marit. Law, p. 486 and note.) "The 89th section of this statute, 6 Geo. 4, C. 125, provides that the act shall not extend to ports in relation to which special provisions have been made by any particular act or acts of parliament. It would clearly seem that, by this section the general act does not apply to the ports of Liverpool and
158 New Castle, and it has been so held. The Liverpool and New Castle acts contain no clause similar to that in the general stat. of 6 Geo. 4, but provide merely that a master shall take a pilot on board or shall pay pilotage. This is similar to our own statutes, and the question arises whether the pilot can be said to be taken on board by such compulsion. That the owner is not liable for his acts. In England the weight of authority is clearly in favor of exonerating the owner. But in this country the question does not seem to be fully determined.

"The Montreal" (24 Eng., L. & Eng., 580,) held that, where a pilot

has been taken on board, under the Liverpool act, to pilot the vessel to the Queen's docks, at Liverpool, and had, subsequently, anchored the next day while proceeding up the river, that the vessel was not liable, the pilot being alone to blame. (1 W. Rob., 95)—the Maria, and (2 W. Rob., 10)—the Agricola. In those two cases, under the New Castle act, it was held that, if the master was obliged to take a pilot on
159 board, or to pay full pilotage, such a taking was by compulsion, and the owners were not liable. In both these cases the vessels were homeward bound.

(2d Curtis C. C., 69.) The Carolus quoted in pp. 485, 486, notes Parson's Marit. Law.

The vessel was going out of the harbor with a pilot on board who was employed by the owner of the vessel, and the vessel was held liable. Curtis, J., said: "If the pilot in charge of this ship had not been selected and employed by the owner, but had been received by the master in obedience to a requisition of law, enforced by a penalty, then the owners would seem not to be liable for the misconduct or mismanagement of the pilot," Semble; that, had the vessel been homeward bound, so that the master would have been obliged to have taken the first pilot that offered, or have paid full pilotage, that the owners of the vessel would not have been liable for the collision. (17 Pet., 20.) Smith vs.
160 Condry. The Supreme Court of the United States, in a case of collision happening in the port of Liverpool between two American vessels, seemed to consider it settled by the English admiralty cases that the owners were not liable if there was a pilot on board.

Acts L'a 1859, art. No. 74, sec. 56, sec. 3.) "That, if any vessel inward or outward bound, to or from the port of New Orleans, shall employ as a pilot a person who is not a duly licensed branch pilot, when a duly licensed branch pilot offers, the said vessel, her captain, and owners shall forfeit the sum of $150 00, with privilege on said vessel, to be recovered before any court of competent jurisdiction in the name of the Charity Hospital of New Orleans, &c.

Sec. 4th. "That all vessels inward or outward bound, to or from the port of New Orleans, (except those of 150 tons or under from L'a, Texas, Mississippi, Alabama, and Florida, which shall come in and go out free,) refusing to take a branch pilot when one offers, shall
161 be liable to the branch pilot thus offering for half pilotage, recoverable with privilege on said vessel before any court of competent jurisdiction.

(Dixon, Law of Shipping, 2 & 3d, p. 240.) The master of a vessel, both on his outward and homeward voyage, to enter or leave a port, is bound to take a pilot on board. If he neglects doing so, and damages ensue, the underwriters are discharged from liability.

(Story, Agency, @ 17, § 456, p. 626.) On the other hand, if it is compulsive upon the master to take a pilot, and, a fortiori, if he is bound to do so under a penalty, then and in such case neither he nor the owner will be liable for injuries occasioned by the negligence of the pilot; for in such a case the pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them, and the maxim, qui facit per alium facit per se, does not apply.

As to the precise words of the Liverpool act, it is impossible to
162 give them, as they are not in the city, but its terms are given in Parsons' Maritime Laws, vol. 1, p. 486, and in Smith vs. Condry, 1 How., 28–23.

2d. The Calhoun, being under the orders and charge of the Merrimac,

and obeying those orders, is not liable, the Calhoun being but the servant of the Merrimac.

(Parsons on Maritime Law, vol. 1, p. 208 and notes.) Parsons says, in notes, unless the ship is represented as under the control of the tug, the tug is not liable. The evidence is clear that, in this case, the Calhoun was under the control of the ship.

See, also, Smith vs. Creole, 2 volume C. C. Rep., 485, and Steam-tug Sampson, 3 Am. Law Rep., 337, cited in above notes.

See, also, Duke of Sussex, 1 W. Rob., 270, and Christ'a, 3 W. Rob., 27, and Gipsey King, 2 W. Rob., 537, cited in notes on page 209, vol. 1, Parsons' Maritime Law.

The principle upon which the American cases are decided is, that the tug (Calhoun) is the agent of the ship, (Merrimac,) and therefore
163 not liable. The evidence clearly establishes this agency, and therefore we respectfully submit that the Calhoun should be discharged, with costs, as she was the mere agent of the Merrimac, even through the Merrimac is liable for the collision.

Judgment.

ECLIPSE TOW-BOAT COMPANY
vs.
S. S. MERRIMAC, ST'RS CALHOUN AND HARRY Wright. } No. 8687.

For reasons orally assigned by the court, it is ordered, adjudged, and decreed that the libel be dismissed, the libellants paying the costs created by them, and the Merrimac those incurred by the three vessels in the defence of this suit.

Judgment rendered January 9th, 1868.

Judgment signed January 15th, 1868.

(Signed) E. H. DURELL,
Judge.

164 *Petition of appeal.—Filed January 20th*, 1868.

ECLIPSE TOW-BOAT COMPANY
vs.
S. S. MERRIMAC, TOW-BOAT CALHOUN, AND TOW-boat Harry Wright. } No. 8687.

In admiralty.

To the honorable the district court of the United States for the district of Louisiana:

The petition of The Eclipse Tow-boat Company respectfully shows that they are dissatisfied with the judgment rendered by this court on the day of January, 1868, in the case of The Eclipse Tow-boat Company vs. The Steamship Merrimac, the Tow-boat Calhoun, and the Tow-boat Harry Wright, and that there is error in said judgment to the prejudice of petitioner. Wherefore petitioner prays to be allowed to appeal from the said judgment to the circuit court of the United States for the fifth circuit and district of Louisiana; said appeal to operate as a
165 supersedeas on giving bond and security in such sum as the court shall determine, and for general relief.

(Signed) BUCHANAN & GILMORE,
Proctors.

Order.

An appeal is allowed in this case as prayed for and according to law, the same to operate as a supersedeas, the appellants giving bond in the sum of $500, with good and solvent security, conditioned as the law directs, said appeal being made returnable to the circuit court of the U. S. for the 5th circuit and district of Louisiana, the 4th Monday of April next.

January 20th, 1868.

(Signed) E. H. DURELL, *Judge.*

Appeal bond.

UNITED STATES OF AMERICA,
District of Louisiana:

District court of the United States. In admiralty.

ECLIPSE TOW-BOAT COMPANY.
166 *vs.* No. 8687. Appeal bond.
STEAMSHIP MERRIMAC AND TOW-BOATS Calhoun and Harry Wright.

Know all men by these presents that we, The Eclipse Tow-boat Company, as principal, and Louis W. Perkins, as surety, are held and firmly bound unto the steamship Merrimac and the tow-boats Calhoun and Harry Wright in the sum of five hundred dollars, to be paid to the said steamship Merrimac and tow-boats Calhoun and Harry Wright; for the payment of which well, and truly to be made, in lawful money of the United States, we bind ourselves and each of us, our and each of our heirs, executors, administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at New Orleans the 20th January, 1868.

Whereas the above-named Eclipse Tow-boat Company has appealed to the next term of the circuit court of the United States for the 5th circuit and district of Louisiana from a final judgment of the dis-
167 trict court of the United States for said district, rendered against The Eclipse Tow-boat Company on the January, 1868, in the above-entitled cause:

Now, therefore, the condition of this obligation is such, that if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs and satisfy whatever judgment may be rendered against him if he fails to make his appeal good, then this obligation to be void; otherwise the same shall be and remain in full force and effect.

(Signed) JOSEPH LEACH. [L. S.]
Act. Pres't E. T. B. Co.

(Signed) LOUIS PERKINS. [L. S.]

Signed, sealed, and delivered in presence of—

(Signed) JA'S LEGEAI.

Certificate of the United States district court.

District court of the United States, district of Louisiana.

168 I certify that the foregoing 191 pages do contain and form a

correct and complete transcript of all the documents filed, evidence adduced, and proceedings had on the trial of the case of The Eclipse Tow-boat Company versus The Steamship Merrimac, Tow-boats Calhoun and Harry Wright, No. 8687 of the docket.

In faith whereof I have hereto set my hand and the seal of our court at New Orleans this 25th April, 1868.

[SEAL.] (Signed) K. LOEW, *D'y Clk.*

PROCEEDINGS BEFORE THE U. S. CIRCUIT COURT, 5TH CIRCUIT AND DISTRICT OF LOUISIANA.

Transcript of appeal filed April 27th, 1868.

Hearing and submission.—Extract from the minutes.

Circuit court of the United States, fifth circuit and district of
169 Louisiana, April term, 1870.

NEW ORLEANS, *Thursday, May 12th*, 1870.

Court met pursuant to adjournment—
Present, Hon. W. B. Woods, presiding judge.
Absent, Hon. E. H. Durell, district judge.

ECLIPSE TOW-BOAT CO. *vs.* ST'R MERRIMAC, &C. } No. 5568.

This cause came on to be heard on the transcript of the record from the U. S. district court for the district of Louisiana.—

Thomas Gilmore for libellant.

Billings and Hughes, Hornor and Benedict for claimants and appellees.

And the counsel for the Harry Wright objecting to the trial on the ground that the claimant, the N. Y. Mail S. S. Company is bankrupt, and that their assignees had not been made parties to this suit, the court thereupon appointed J. McCornell, esq., now here present, to represent said assignees, and directed the trial to be proceeded with.

And, after hearing the pleadings, evidence, and argument,
170 the court took time to advise.

Decree.—Extract from the judgment docket.

United States circuit court, fifth circuit and district of Louisiana, April term, 1870.

NEW ORLEANS, *Saturday, May 14th*, 1870.

Court met pursuant to adjournment—
Present, Hon. W. B. Woods, presiding judge.
Absent, Hon. E. H. Durell, district judge.

ECLIPSE TOW-BOAT COMPANY *vs.* STEAMSHIP MERRIMAC, TOW-BOATS CALHOUN and Harry Wright. } No. 5568.

For reasons orally assigned by the court, considering that the steam-

ship Merrimac alone is liable in this case, it is ordered, adjudged, and decreed that, so far as the tow-boats Calhoun and Harry Wright are concerned, the judgment of the district court of the United States for the district of Louisiana, rendered on the 9th of January, 1868,
171 be affirmed; but, as regards the said steamship Merrimac, that said judgment be reversed.

And it is now ordered, adjudged, and decreed by this court, that the Eclipse Tow-boat Company do have and recover damages from the said steamship Merrimac, her tackle, apparel, &c., in the sum of four thousand six hundred and ninety-seven $\frac{49}{100}$ dollars with 5% interest from 19th January, 1867, till paid, and costs of suit. And, considering that the said steamship was released from seizure and restored to the claimants on giving bond conditioned as the law directs, it is further adjudged and decreed that the New York Mail Steamship Company, by W'm Creevy, their agent, claimants and owners of the said steamship Merrimac, as principals, and David McCoard, and Creevy, Nickerson & Co., as sureties, on the release bond, be condemned in solido to pay the foregoing judgment with costs.

Decree rendered May 14th, 1870.
Decree signed May 19th, 1870.
(Signed) W. B. WOODS, *Judge.*

172 *Petition for appeal.—Filed May 28th, 1870.*

U. S. circuit court.

ECLIPSE TOW-BOAT COMPANY *vs.* THE STEAMSHIP MERRIMAC & ALS. } No. 5568.

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of William Creevy, William Creevy, Theodore Nickerson, and Charles Fox, composing the firm of Creevy, Nickerson & Co., and D. McCoard, with respect, represents that they are aggrieved by the decree rendered against them by this honorable court, on the 19th day of May, A. D. 1870, in the cause of The Eclipse Tow-boat Company versus The Steamship Merrimac et als., No. 5568 of this docket, and are advised that there is error therein to their prejudice.

Wherefore they pray that an appeal be allowed them therefrom,
173 returnable to the next term of the Supreme Court of the United States upon their giving bond, conditioned according to law, with good and solvent security thereon in such sum as the court may direct.

(Signed) BILLINGS & HUGHES,
Proctors for Petitioners.

Motion and order granting an appeal.—Extract from the minutes of Saturday, May 28th, 1870.

ECLIPSE TOW-BOAT COMPANY *vs.* STEAMSHIP MERRIMAC & ALS. } No. 5568.

On motion of Billings and Hughes, proctors for defendants herein, W'm Creevy; W'm Creevy, Theodore Nickerson, and Cha's Fox, composing the firm of Creevy, Nickerson & Co., and David McCoard, and

on presenting to the court and filing petition on behalf of the defendants herein, representing that they are aggrieved by the decree of this court, herein rendered on the 19th day of May, 1870, and are advised that there is error therein to their prejudice, and praying an ap-
174 peal therefrom to the next term of the Supreme Court of the United States; it is ordered that the same be allowed as prayed for, on defendant's giving bond, conditioned according to law, in the sum of $10,800, with good and solvent surety thereon.

Appeal bond.—Filed May 28th, 1870.

United States circuit court.

ECLIPSE TOW-BOAT COMPANY
vs.
STEAMSHIP MERRIMAC, &C. } No. 5568. Bond for appeal.

Know all men by these presents that we, William Creevy, William Creevy, Theodore Nickerson, and Charles Fox, composing the firm of Creevy, Nickerson & Co., and David McCoard, as principals, and Williamson Smith, and Joseph Johnston, as sureties, are held and firmly bound, jointly and severally, unto The Eclipse Tow-boat Company, in the sum of ten thousand eight hundred dollars, lawful money of
175 the United States of America, to be paid to the said Eclipse Tow-boat Company, their heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the 28th day of May, in the year of our Lord eighteen hundred and seventy.

Whereas William Creevy; William Creevy, Theodore Nickerson, and Charles Fox, composing the firm of Creevy, Nickerson & Co., and David McCoard, have this day presented a petition to the honorable the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, praying for an appeal to the Supreme Court of the United States, from a final decree rendered against them on the 19th May, 1870, in the case entitled, The Eclipse Tow-boat Company versus Steamship Merrimac, Tow-boat Calhoun and Tow-boat Harry Wright, No. 5568 of the docket of said circuit court:

176 Now, the condition of the above obligation is, that we, the above-bounden William Creevy; William Creevy, Theodore Nickerson, and Charles Fox, and David McCoard, will well and truly pay to the said Eclipse Tow-boat Company, the defendants in said appeal, all such damages and costs as they may recover against us, in case it should be decided that the said appeal was wrongfully obtained.

(Signed)	WILLIAM CREEVY.	[L. S.]
(")	THEO. NICKERSON.	[L. S.]
(")	CH'S W. FOX.	[L. S.]
(")	CREEVY, NICKERSON & CO.	[L. S.]
(")	DAVID McCOARD.	[L. S.]
(")	WILLIAMSON SMITH.	[L. S.]
(")	JOSEPH JOHNSTON.	[L. S.]

Signed, sealed, and delivered in the presence of—
(Signed) F. B. VINOT.

Bond accepted and approved May 28th, 1870.
(Signed) W. B. WOODS, *Judge.*

177 UNITED STATES OF AMERICA,
Circuit court of the United States,
Fifth Circuit and District of Louisana:

CLERK'S OFFICE.

I, Dominick Urban, clerk of the circuit court of the United States, for fifth circuit and district of Louisiana, do hereby certify that the foregoing 176 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of The Eclipse Tow-boat Company vs. Steamship Merrimac and steam tow-boats Calhoun and Harry Wright, No 5568 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and seal of said court, at the city of New Orleans this 13 day of August, A. D. 1870.

[SEAL.] D. URBAN, *Clerk.*

[5 c't int. rev. stamp affixed and canceled.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Dominick Urban, whose name is signed to the above certificate as clerk of the circuit court of the United States for fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 13 day of August A. D. 1870.

E. H. DURELL, *Judge.*

[5 c't int. rev. stamp affixed and conceled.]

178 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to The Eclipse Tow-boat Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the city of Washington, on the first Monday of December next, pursuant to a petition for appeal & an order of record & filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein William Creevy; William Creevy, Theodore Nickerson, and Charles Fox, composing the firm of Creevy, Nickerson & Co., and David McCoard are appellants, and you are defendants & appellees, to show cause, if any there be, why the judgment rendered against the said appellants as in said petition mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this thirty-first day of May, in the year of our Lord one thousand eight hundred and seventy.

W. B. WOODS, *Judge.*

179 (Indorsed:) United States circuit court. No. 5568. Eclipse Tow-boat Co. vs. The Steamship Merrimac & als. Citation of appeal.

Marshal's return.

Received May 31, 1870, by the U. S. marshal, and on the 6th day of August, 1870, served a copy hereof on The Eclipse Tow-boat Company, by handing the same to Peter Marcy, president of said company.
N. O., Aug. 12, '70.

S. W. REED,
D'y U. S. Marshal.

(Indorsement on cover:) No. 366. William Creevy; W'm Creevy, Theo. Nickerson, & Charles Fox, as Creevy, Nickerson & Co., and David McCoard, appellants, vs. The Eclipse Tow-boat Company. Louisiana C. C. U. S. Filed 9th December, 1870.

Supreme Court of the United States.

DECEMBER TERM, 1871.—No. 163.

WILLIAM CREEVY AND OTHERS, Appellants,

vs.

THE ECLIPSE TOWBOAT COMPANY, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF LOUISIANA.

BRIEF OF APPELLANTS.

J. HUBLEY ASHTON,
Of Counsel.

McGill & Witherow, Printers, 1107 F street, Washington, D.C.

Supreme Court of the United States.

DECEMBER TERM, 1871.

WILLIAM CREEVY AND OTHERS, Appellants,

vs.

THE ECLIPSE TOWBOAT COMPANY, Appellee.

No. 163.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF LOUISIANA.

STATEMENT OF THE CASE.

The appellee, as owner of the steam tugboat Gladiator, libelled in a cause of collision, in the District Court for Louisiana, three vessels, to wit: the steamship Merrimac, the steam towboat Calhoun, and the steam towboat Harry Wright.

Answers were filed on behalf of the respondent vessels as follows:

Answer of Merrimac, Rec., p. 15.

Answer of Calhoun, Rec., p. 11.

Answer of Harry Wright, Rec., p. 17.

The testimony having been taken on behalf of the libellants and respondents, the district court, on January 9, 1868, entered a decree dismissing the libel against the three vessels, and directing that the libellants pay the costs created by them, and that the owners of the steamship Merrimac pay the costs incurred by the three vessels against which the suit was instituted.

Decree of District Court, Rec., p. 56.

The libellants thereupon appealed to the circuit court, who, on the 14th of May, 1870, entered a decree affirming the decree of the district court, so far as the same dismissed the libel against the towboats Calhoun and Harry Wright; but reversing the same, so far as the decree of the district court dismissed the libel as against the steamship Merrimac.

And the circuit court further adjudged, that the Eclipse Towboat Company, owner of the towboat Gladiator, (the present appellee,) recover damages from said steamship Merrimac in the sum of $4,697 49, with interest from January 19, 1867.

Decree of Circuit Court, Rec., pp. 58, 59.

From this decree the claimants of the steamship Merrimac have appealed to this court.

ABSTRACT OF THE PLEADINGS.

The following is an abstract of the libel and the answers:

I. The libel alleges that, on the 11th of January, 1867, between one and two o'clock of the afternoon, the steam tugboat Gladiator was made fast to the larboard side of the ship Celuta, endeavoring, with the steam tugboat Switzerland, (on the starboard side of the ship Celuta,) to get that ship over the bar of the Southwest Pass of the Mississippi, on which she had been for twelve hours grounded. These three vessels, it is alleged, thus lying side by side on the bar, were at a distance of 70 to 75 feet to the eastward of a certain "*wreck*" upon the said bar, the Gladiator being the nearest to the wreck, and her port or larboard side being at the above distance therefrom.

In this situation, it is alleged, the steamship Merrimac, with the steam towboat Calhoun on her starboard side, and the steam towboat Harry Wright on her port side, ap-

proached the bar of the Southwest Pass, and attempted to cross the bar *between* the Gladiator and the said wreck. It is alleged, that all three vessels were under a full head of steam, and under the united impulsion of all their engines and steam power; that there was not room in the intervening space for the said vessels to pass; that, in thus attempting to pass the Gladiator, and keep clear of the "wreck" to the port of the three vessels, the three vessels bore down, with all united their weight and impetus, upon the steamtug Gladiator, the blow being given by the towboat Calhoun, which was the nearest to her.

The libel states as follows: "The Calhoun having a considerable list to port, her starboard guard was elevated considerably, and passed over the rail of the Gladiator, striking the latter vessel with extreme violence, raking her from stem to stern, and carrying away all her upper works. By the said collision, the Gladiator's cabin, cook house, pilot house, and engine room were entirely smashed to pieces, and carried from the port side over to the starboard side of the vessel. Her boiler was knocked out of place, her steam drum broken to pieces, her lever and exhaust pipe broken, and other damage done to the engine. Her railing, stanchions, wire rigging, and chain plates were carried away entirely; several timber knees in the hull of the vessel were broken. In short, the said steamtug Gladiator was reduced to a complete wreck, and had to be towed to New Orleans for repairs, which she is now undergoing, and which, when completed, will cost, as estimated, about ten thousand dollars, inclusive of the loss of her business, and the earnings of said vessel while repairing."

The libel further averred that the collision was occasioned by the careless, negligent, and unskillful management of the steamship Merrimac, the steam towboat Calhoun, and the steam towboat Harry Wright.

II. The answers. (a.) The *Merrimac's* answer sets up, in bar of the action, the fact that she and the two tugboats were, at the time, in the charge and under the control of

a Branch Pilot, taken on board conformably to the requirements of the laws of the State; and alleges that the owners ceased to be responsible in any way for the navigation of the vessels, or for any collision while under the control and management of such pilot.

The answer further avers, that the Merrimac was lashed to and towed by the Calhoun and Harry Wright; that there was sufficient water to allow the vessels to come up the passage between the "wreck" and the Gladiator; that they came up in a skillful and proper manner, but that on passing the Gladiator, and upon the vessels' striking shoal water, they *canted* two points towards the Gladiator, when it became impossible to prevent a collision; that said *canting* could not have been anticipated or prevented; and that the attempt of the said vessels to pass up said passage would have been successful except for the unforeseen accident of canting, which the most skillful seamanship could not anticipate. (See Rec., pp. 15, 16.)

(*b*) The answer of the *Calhoun* alleges that she was a tow-boat, wholly under the charge of the Merrimac; and that the collision was no fault of hers, and was occasioned either by inevitable accident or the fault of the Merrimac or Gladiator. (See Rec., p. 11.)

(c) The answer on the part of the *Harry Wright* is to the same general effect as that on behalf of the Calhoun. It states, that the steamship Merrimac was in charge of a proper pilot; that the Wright was made fast to that steamship, and wholly under the control and guidance of her proper officers. The collision was caused either by inevitable accident, or by the fault of the Merrimac or Gladiator. (See Rec., p. 17.)

Abstract of The Proofs.

The following is a short summary of the evidence of the master of the steamship Merrimac, the first officer of the Merrimac, the pilot of the steamer, the pilot at the wheel, and the captain of the Calhoun, constituting the principal proof for the respondents:

ED. VAN SLICE, master of steamship *Merrimac*, (Rec., p. 18,) says, at his arrival at the bar, he took a bar pilot on board and gave him charge of her. He gave all the orders. After the tug-boats—Calhoun and Wright—were attached to the Merrimac, the pilot was in charge of all three.

There was enough room between the wreck-buoy and the Gladiator for another one to pass.

At that time, when nearly up abreast of the Gladiator, when there was room between the Calhoun and Gladiator for another steamer, we took a sheer. The cause of the sheering was the ship's heel touching the ground, the ship drawing more water aft than forward. It is impossible to guard against the sheering, because she is as liable to sheer one way as the other. But for this sheering there would have been no collision.

The depth of the water between the Celuta and the buoy, where the Merrimac attempted to pass to the eastward of the wreck buoy, was 15 to 16 feet. The pilot sounded the depth of the water on the morning of the collision. Where the Merrimac's nose was at the time when the sheer took place there was 15 feet water, but her heel was in shoaler water. The Merrimac drew between 15 and 16 feet water. The Calhoun and Harry Wright were employed and paid by the Merrimac to tow her over the bar. They were engaged only to assist her over the bar. The Merrimac employed these two tow-boats to tow her over the bar to prevent sheering. It was not because it was known that the Merrimac drew more water than there was on the bar; it was not because it was anticipated that the Merrimac might touch in going over the bar; but solely to prevent sheering. (See Rec., 18–21.)

JOHN H. PLATT, first officer of *S. S. Merrimac*, (Rec., p. 21,) says that the distance was about 200 feet between the Gladiator and the wreck buoy. *The distance was nearly twice room enough for three vessels lashed together to pass.* The cause of the collision was that the Merrimac touched on her heels, and then she sheered. But for the sheering, she

would have gone clear of the vessels. The breadth of the beam of the Merrimac is about forty feet. He judges that the Calhoun and Harry Wright were each 30 to 35 feet from outside to outside of their paddle boxes. (See Rec., pp. 21, 22.)

AMOS TOWNE, pilot of *S. S. Merrimac*, (Rec., p. 41,) says that he has been a branch pilot since 1847, and has followed that business constantly since then, except during the war. That he was acting pilot on the steamship Merrimac on the 11th of January, 1867.

On the day of the collision arrangements were made with the tug-boats Harry Wright and Calhoun to assist in taking the S. S. Merrimac from anchor outside of the bar, to bring her over the bar. After commencing from starting from anchorage, we started with low spead, and proceeded on until we entered the channel, which we had sounded out. We proceeded steadily along up the channel, when suddenly the S. S. Merrimac took a sheer to the eastward. He thinks the Gladiator was about 200 feet somewhere between east and southeast from the wreck buoy. There was no other channel through which the Merrimac could have passed. He had made soundings to that effect, and knows this to be the fact. He had full opportunity to estimate the distance between the wreck buoy and the Gladiator. It was good seamanship to make the endeavor to pass through. The collision was no doubt caused by the Merrimac striking some shoal place and sheering. He calls a shoal place a mud lump. Had it not been for that, the Merrimac would have gone safely through. The object of taking the Calhoun to tow the Merrimac was to steer her, as she was so much by the stern that her rudder would not act well. The Calhoun was taken to assist in keeping the Merrimac straight. The Calhoun had nothing to do with the steering except by his orders. There was a lump between the Gladiator and our vessel that prevented us to head for the Gladiator, but was not aware of it until we touched it. That lump was the cause of the sheer. There

would have been no difficulty in taking, the Merrimac, drawing 15½ feet aft, over 13 feet water with the ordinary mud of the river, if it had not been for the lumps on which the water is shallower. (See Rec., pp. 41, 43.)

EDWARD BEALS, a river pilot, (Rec., p. 43,) says he was on board the S. S. Merrimac on the morning of 11th January, 1867. Mr. Amos Towne sounded the bar in his presence. He concluded he could take the ship through that channel with the assistance of the two tow-boats to assist in steering the Merrimac over the bar. The two tow-boats were made fast to the Merrimac and got underway. He thinks the distance between the wreck buoy and the Gladiator was 185 to 190 feet. The Merrimac outside of all is 40 feet, the Calhoun 45 to 48 feet, and the Harry Wright from 35 to 38 feet. There was room enough between the wreck and the Gladiator for the Merrimac and the tug-boats to pass. (Rec., pp. 43, 44.)

JAMES P. JACKSON, Captain of the Calhoun, (Rec., p. 31) says the Calhoun was lashed to the Merrimac in order to keep her straight. The Merrimac had motive power enough. The distance between the Gladiator and the wreck was from 160 to 200 feet. There would have been 10 or 15 feet on each side of the three vessels had they been kept straight. The sheering of the Merrimac was the cause of the collision. He discovered there was danger of a collision about five minutes before it took place. He immediately cut loose from the Merrimac, backed his engine, and hallooed to the pilot on the Merrimac to back his engine.

There are lumps on the bar at that point of the river where the collision took place. *It was not possible for me to prevent the collision without disobeying the pilot who had charge of the Merrimac.*

On *page* 32 he says this was the first attempt the Merrimac made to cross the bar, about 10 o'clock in the morning. The Calhoun came down to the bar and the Merri-

mac was lying at anchor outside. The collision took place immediately after he cut the ropes from the Merrimac. The Calhoun immediately backed her engine and cut the ropes, but that did not prevent the Calhoun from running into the Gladiator. The Gladiator was at least 250 feet from the wreck.

The Calhoun was only entitled to pay in case she had crossed the Merrimac over the bar. The wreck in question is supposed to be one of the old dry docks that were sunk there. The main channel is altogether to the westward of this wreck, but there is equally as good a channel to the eastward. The width of the channel is greater to the westward than to the eastward. There was a vessel aground to the southward of the wreck, a little to the eastward. The ship Celuta, that the two boats Gladiator and Switzerland had in tow, was aground to the southward of the wreck. (See Rec., pp. 31, 32.)

POINTS OF APPELLANTS.

First. The question as to the construction and effect of the *Pilot Laws* of Louisiana, and the question whether the fact that the Merrimac was under the control of a pilot taken on board conformably to those laws, exonerated her from liability for this collision, seem to be adjudged by the decision of this court in the case of *The China.* (7 Wallace, 53.)

The subject appears to have been fully considered in argument by the counsel in the district court before the decision in the case of *The China.* Their briefs are on file in this Record. (Rec. pp. 465–7.)

By the brief on the part of the *Merrimac* (Rec. p. 50) it appears that the statutes of Lousiana compel an inward-bound vessel to employ the first duly-licensed pilot, by imposing the liability of paying to the pilot so offering half pilotage; and further, that when any inward-bound vessel shall employ as a pilot one not duly licensed, where one duly licensed has offered, shall forfeit the sum of $100,

to be recovered in the name and for the benefit of the Charity Hospital at New Orleans. (See acts 1859, No. 74, p. 57, sec. 394; and acts of 1864 and 1865, No. 56, p. 166, sec. 12.) And in the brief on the part of *The Calhoun* further reference is made to these statutes. (Rec. p. 54.)

Second. Upon the proofs in the record it is respectfully submitted, on behalf of *The Merrimac*, that the collision in question was a case of inevitable accident, without blame being imputable either to the libellant's vessel or the steamship Merrimac, and that under the rule in that case, so often declared from this bench, the Merrimac cannot be held liable for the injury to the Gladiator.

(*a*) When the collision occurs exclusively from natural causes, and without any negligence or fault, either on the part of the owners of the respective vessels or those intrusted with their control and management, the rule of law is that the loss must rest where it fell, on the principle that no one is responsible for such an accident, if it was produced by causes over which human agency could exercise no control.

Stainback *et al. v.* Rae *et al.*, 14 How., 538.

The principle is stated in similar terms by eminent judges of this court in the following subsequent cases:

The James Gray *v.* The John Fraser, 21 How., 194.
Union S. S. Co. *v.* N. Y. & Va. S. S. Co., 24 How., 313.
The Morning Light, 2 Wall., 556.

(*b*) It would seem from the evidence, to which reference has been made, and other proofs in the record, that the sole cause of this collision, so far as the Merrimac is concerned, was the sheering of that vessel, under the circumstances stated in the testimony of the master and pilot, and that the accident could not have been avoided by the exercise of care, caution, or maritime skill on the part of those in charge of her navigation.

The pilot, Towne, is proved to have been an experienced person. He sounded the channel, and found the necessary depth of water; and he states there was no other channel through which the *Merrimac* could have passed. He deemed the distance between the *Gladiator* and the wreck buoy quite sufficient to enable the *Merrimac* to pass, with the tugs at her side; and the other witnesses confirm him. It appears that the sheering was occasioned by the Merrimac striking some shoal place or lump, which caused her to cant to the starboard, and thus bring the *Calhoun* in contact with the libellant's vessel. This was a natural cause; and it is not perceived that there was any contributory negligence, or want of exertion, care, or maritime skill on the part of any person on board the *Merrimac*.

Third. But if there was any fault on the part of the *Merrimac*, equal, if not greater, fault is imputable, under the evidence, to the two tug-boats—the *Calhoun* and the *Harry Wright*—and the circuit court erred in dismissing the libel as against those vessels.

(*a*) It would seem from the proof that these tugboats were employed a short time before the Merrimac started, solely for the purpose of assisting her to pass the bar *at the place which the pilot had selected, to the eastward of the wreck-buoy.* The object was to keep her straight and prevent her sheering in the channel. The Merrimac had sufficient motive power to enable her to proceed without assistance; and the other vessels were attached solely to prevent the very accident which occurred.

It is plain, therefore, that if there was any negligence or fault in this attempt of the Merrimac to pass between the wreck-buoy and the Gladiator—if the *Merrimac* is to be held blameworthy for going between those objects at the place selected—the *Calhoun* and the *Harry Wright* were equally in fault when they undertook, lashed to her side, to accompany her in this supposed dangerous navigation.

Whatever danger there was in making this attempt, the Calhoun and the Wright knew of it as well as the pilot of the Merrimac. The masters of the Calhoun and Wright were free agents, and were by no means obliged to aid and assist in any dangerous enterprise of passing to the east of the wreck. They placed themselves voluntarily under the control of the pilot of the Merrimac, and lashed their vessels to her side with a determination to take all the risk consequent upon an attempt to cross the bar at this point.

One of the possible risks undoubtedly was that of a collision with the Gladiator; and, as all three vessels were principals in the enterprise, if there was any culpable fault, all were equally guilty, and should be held jointly liable.

The blow which was given by the Calhoun was in effect the blow of the three vessels, all of whom were engaged in a joint attempt to pass the Gladiator, and all of whom must be affected with whatever fault there was on making that attempt, and with the consequences of it. The *Merrimac*, *Gladiator*, and *Wright* represented, under the evidence, *one* vessel in the collision with the Gladiator.

(*b*) If any vessel was more blameworthy than the others in this transactton, it was undoubtedly *the Calhoun*, who might have cut loose from the Merrimac before she did, and thus saved the collision. (Dep. of Jackson and Towne, Rec., pp. 31, 41.)

Fourth. Independently of the particular circumstances of the present case, *the Calhoun* should be held responsible, assuming there is liability anywhere, either jointly with the Merrimac or alone, for this collision, as she (the Calhoun) was the vessel which struck the blow, and, in the view of the maritime law, was the offending thing.

The maritime law puts its hand on the *offending thing*, and, without inquiring who is the proprietor, gives a remedy, in favor of the injured party, against the vessel itself which has caused the damage.

The very blow, (it has been well said,) which inflicts the

culpable injury upon the innocent vessel, impresses in her favor a *lien* of indemnity upon the offending vessel. The proceeding *in rem* of the admiralty is but a judicial consummation of this lien, and requires for its support nothing but proof of such fault of the vessel as, by the rules of maritime law, raises the lien.

It was in accordance with these doctrines that Judge Sprague decided that, where a ship was towed by a steamer, and the latter came in collision with another vessel, the steamer was liable, if there was any negligence in causing the collision, whether the steamer was under the control or not of the officers of the ship.

The R. B. Forbes, Sprague's R., 329.

The principle of the proceeding *in rem*, said that learned admiralty judge, required that the instrument which inflicts the injury should be responsible for the damages.

Fifth. The careful and elaborate exposition of the admiralty doctrine applicable to the case of vessels colliding with ships accompanied by steam-tugs, contained in the opinion of Mr. Justice Clifford, speaking for this court, in the leading case of STURGIS *v.* BOYER *et al.*, (24 How., 117–121,) sustains the view heretofore presented, that, upon the proof in this case, all three vessels joined in this libel, if any fault is imputable to either in the transaction, are jointly liable for the consequences of this collision.

It is needless to further press the remark previously made under the *Third Point* of this brief, that the evidence shows all the vessels were principals in the enterprise in execution of which the collision occurred. The vessels were proceeding under their own motive power. Those in charge of them jointly participated in their management. And if there [redacted] any imprudence, negligence, want of maritime skill, or due care is evinced in the case of one vessel, the same fault existed in the case of all; and all must be held responsible for the damages sustained by libellant.

Sixth. It is submitted that the decree of the circuit court sustaining the libel as against the Merrimac should be reversed, and a decree entered directing that court to dismiss the libel.

But if the court should be of the opinion that any vessel is responsible for the happening of the collision, then we contend that the decree below, dismissing the libel as to the tugboats Calhoun and Harry Wright, should be reversed, and the cause remanded with directions to enter a decree accordingly against those vessels.

J. HUBLEY ASHTON,
Of Counsel for Appellants.

Supreme Court of United States.

DECEMBER TERM, 1871.

No. 168.

WILLIAM CREHVT *and others, appellants,*
against
THE ECLIPSE TOW BOAT COMPANY, *appellee.*

Appeal from decree of Circuit Court of United States for Louisiana.

CONWAY ROBINSON,
Counsel for Eclipse Towboat Company.

H. Polkinhorn & Co, prs., D st., near 7th, Washington

Supreme Court of United States.

DECEMBER TERM, 1871.

No. 163.

WILLIAM CREEVY *and others, appellants,*
against
THE ECLIPSE TOW BOAT COMPANY, *appellee.*

Appeal from decree of Circuit Court of United States for Louisiana.

Abstract of the case.

The Eclipse tow-boat Company, a corporation formed under the laws of Louisiana, owners of the steam tug Gladiator, exhibited their libel in January, 1867, against the steamship Merrimac and the steam tow-boat Calhoun, and the steam tow-boat Harry Wright to recover damage for collision upon the allegations, p. 1 to 3.

The warrants and the Marshal's proceedings thereon, are p. 5 to 11, whereby it appears (p. 5,) that the Merrimac was released from seizure on a stipulation with surety, in the amount of $15,000, to answer the decree. The stipulation is pp. 5, 6.

The New York mail steamship company intervened for interest in the Merrimac, (pp. 14, 15,) and filed the answer, pp. 15, 16.

For the libellants was taken, February 9, 1867, the testimony pp. 12, 13, of Alexander Krog, pp. 13, 14, of Christian Johansen, and p. 14 of Thornwald Damnevig,

the latter of whom being recalled February 13, 1867, his further testimony is pp. 16, 17. Afterwards was taken March 8, 1867, the testimony of Theodore Schultz, the pilot of the Gladiator, p. 23 to 26, Jacob Schultz her captain, pp. 25, 26, John Campbell, her steersman, (p. 26,) and Patrick Morrisey and George Spencer, firemen, (p. 27;) and on the 25th of March, 1867, the testimony of Martin Davis, who, when the collision took place, was on the tow-boat Switzerland, on the starboard side of the Celuta, the Gladiator being on the larboard side, (p. 27;) and the testimony of Augustus Rouyer, carpenter on board of the Switzerland, (pp. 29, 30.)

On behalf of the claimants of the Merrimac was taken February 21, 1867, the testimony of Edward Van Slice, (or Van Sice,) (p. 18 to 21,) John H. Platt, (pp. 21, 22;) and May 23, 1867, for the claimants of the Merrimac and Calhoun, the testimony of Amos Towne, pilot on the Merrimac, p. 41 43,) and Edward Beals, a pilot who was also on board on the 11th of January, 1867, (pp. 43 44.) (There was also taken separately for the claimants of the Calhoun, May 18, 1867, the testimony of James P. Jackson, p. 31, recalled May 20, p. 32.)

As to the amount of damage from the collision, the libellants took May 20 and 23, 1867, the testimony of Lewis W. Perkins, (p. 33 and p. 40,) with which are the documents, p. 34 to 41.

The Court required an argument as to the liabilities of the owners of a vessel for damages occasioned while the vessel had a licensed pilot on board. The brief for the libellants is p. 51 to 53, that for the Harry Wright, pp. 46, 47, and pp. 48, 49, for the Calhoun, pp. 53, 54, and for the Merrimac, p. 49 to 51, and p. 54 to 56.

It was decreed by the District Court, (p. 56,) that the libel be dismissed, the libellants paying the costs occa-

sioned by them, and the Merrimac those incurred by the three vessels in defence of the suit. It was so decreed, notwithstanding the following:

Evidence.

The Norwegian ship Celuta, bound from Liverpool to New Orleans, got aground in the day-time of January 10, 1867, on the bar at the Southwest Pass, and being aground on that bar the day after, the Switzerland on the starboard side and the Gladiator on the port side, made fast to her and worked at her to get her off; sometimes moving her and sometimes not. Not far off was a buoy which marked a wreck. In the afternoon * of the 11th, when the Celuta (as far as *Krog*, her first mate could see) was not moving but was stuck fast in the mud, the bar was approached by three steamers lashed together, to wit: the Calhoun on the starboard and the Harry Wright on the larboard of the Merrimac; the three steamers working their engines and coming in very fast. The Calhoun, going ahead, ran into the Gladiator and touched her on port side, in the middle first. According to *Krog*, "she touched her so hard that she knocked down all their houses and upper work; the bow of the Calhoun touched the Gladiator; her whole length ran over the Gladiator and broke everything that was on deck; the steam pipe was broken and shoved on the other side," (p. 13.) All the steam of the Gladiator went out, and her engines were stopped, and the Switzerland towed her up, (p. 13,) Krog is supported by *Thornwald Damnevig*, captain of the

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* *Martin Davis*, (p. 27,) says, "between one and two o'clock, *Augustus Rouyer*, (p. 30,) says, after "I came from dinner. We take dinner at twelve o'clock, sometimes a little after. Always take an hour after dinner."

ship Celuta,* (p. 14,) and by *Christian Johansen*, † (p. 13.) The captain being recalled says, "I noticed that buoy which marked the place where the wreck was; there was also a ripple of the water indicating the place where the wreck was. There was perhaps room enough between the Gladiator and ripple for one vessel to pass, but not enough for two or three to pass, in my opinion." "I should judge there were about 10 fathoms from my vessel to that ripple—perhaps 12 fathoms. We were to the eastward of the wreck The three vessels, the Merrimac, with the Calhoun and Harry Wight on each side of her, came between the wreck and the Gladiator. There was the Bremen ship Carl on the western side of the buoy that marked the wreck aground on the bar; and higher up also, to the westward of the buoy, the steamship Morning Star." Again he says, (p. 17.) "In my opinion, there was not room enough between the wreck and the Gladiator for three vessels to pass. *I am positive that there was not room enough for three vessels to pass.* I will further add that it was impossible for three vessels to pass without either coming in the ripple or in collision with the vessels." (pp. 16, 17.)

The scene is yet more graphically described by those on board the tow-boat Switzerland, by *Martin Davis*, pp. 27, 28, 29, and *Augustus Rouyer*, pp. 29, 30;—Davis, the master of that boat, stating in much detail the circumstances of the collision. Speaking of the Gladiator, he says: "We had given her a fair trial; she could not get in; and we stopped to wait for high water; we had been stuck fast in the identical position about two hours before the collison," (p. 28.) In the meantime, the Harry

* He says "when I left the deck before the collision she was as hard aground as she could be." (p. 14.)

† He says "it was broad day light," and adds "as far as I remember, it was not a bright day, but I could see far off." (p. 14.) Others say "it was fine calm weather, the sun shining." (p. 28.)

Wright was made fast to the ship Merrimac, and the Merrimac blew *one* whistle which drew my attention; then when the whistle was blown, the Calhoun fired up and went along side the Merrimac; that still drew my attention more." Then they came in, all three in one column. We were working then on the ship Celuta *which was ground afast.* They pointed the Merrimac for us as straight as she could go.* Then I told Captain Schultz to watch, they were coming, and there was no room for them to pass. The first thing I saw was, Captain Jackson, of the Calhoun, stamped his foot down, as there was no room for him to pass. In the meantime they came on the Gladiator,† ran into her and tore her to peices, her cabin, boiler, connection pipes, steam drums, railing, chains, steering apparatus, &c., &c." He says: "The distance between the Gladiator and the wreck buoy was sixty feet‡ angle southward and eastward from the wreck. The wreck that I speak of is about six or seven feet under water. The place where the wreck is, is marked by a buoy. The vessels that had the Celuta in tow were southward and eastward of the wreck. The Gladiator was the nearest of the three to the wreck. I am acquainted with the bar; have been there some thirty odd years in the capa-

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* "The three vessels came directly to us in a line. They did not change that course at all," (p. 28.) "The Merrimac was pointed directly towards the Gladiator," (p. 28.)

† "The Calhoun stopped her engines when she was about her own length from the other vessels. She was then too near to avoid a collision. Had she stopped her engines at a distance of 300 feet from the Merrimac, she would have had time to back out without coming in collision. I observed the vessels from the time they crossed over the bar to the time they struck the Gladiator." "Had I been in the place of the Captain of the Calhoun, I would have regarded it as my duty to cut my boat's line and back her out when I saw the collision was inevitable. The Captain had no time to cut off and leave when I saw her Captain stamped his foot," (pp. 28, 29.)

‡ "I am positive that the distance between the Gladiator and the wreck was not more than sixty feet," (p. 28.)—"The Gladiator was southward and eastward from the wreck at a distance of sixty feet," (p. 28.)

cities of master, pilot, &c. *It was not prudent for these vessels to attempt to come in between us and the wreck.*" "I could not tell the width of the three vessels, but I know it was larger than the distance between us and the wreck." "A pilot was in command of the Celuta; we conferred together and agreed what we could do." "Just as the Merrimac was coming over the bar in tow of the Calhoun and Harry Wright we commenced working; as I remarked to the pilot, the water was getting high and we might get in, the ship was aground, and we could not move her. I did not move her bow or stern a little to the eastward or the westward—we could not budge her," (p. 29.)

Concurring testimony is given by those on board the Gladiator—her pilot, * captain, † steersmen and fireman, (p. 25 to 27.)

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* "He says, (p. 23,) the Celuta was fast on the bar;" the Gladiator "about 60 ft. below the wreck, to the southeastward of the wreck."—"Previous to the collision the captain of the Gladiator gave orders to let go our ropes, but the collision was so sudden that we had no time to get out of the way."—"Don't think that either one of the boats could have passed between the Gladiator and the wreck; there was not sufficient room to pass there without danger."—"When I first noticed the Merrimac, Calhoun and Harry Wright they seemed to be coming in between the wreck-buoy and the ship Carl, where there was twice the room as there was between the wreck-buoy and the Celuta. Immediately after making this remark they changed their direction and came in the direction of the wreck-buoy and the Gladiator." On cross-examination he says: (p. 25,) "To the best of my judgment, there was not over sixty feet between the buoy and the Gladiator. At the time of the collision, the Gladiator and Merrimac both headed upstream. The Harry Wright has a width of about sixty feet. The Calhoun is wider still, some ten feet, but am not sure. The Merrimac might have fifty feet on beam, perhaps more." Being asked how it was possible for the three vessels forming a width of 180 feet to pass through the small space of sixty feet and strike the Gladiator on the bow," he answers, "it was not necessary to go between us and the wreck to strike us on the bow, because we were below the wreck. The Merrimac was coming up in a line parallel to that of the Gladiator. The captain of the Calhoun did not do all he could have done, for had he cast his boat loose, his own boat would not have struck us."

† He concurs in the pilot's evidence "in regard to the collision and to the space of sixty feet spoken of by him." He says, "we were sixty feet in a triangle from the wreck; sixty feet to the southward and sixty feet to the eastward. The Gladiator was sixty feet to the southward

Against this strong evidence, the matter mainly relied on in the Court below, seems to have been, that after the tugboats, Calhoun and Harry Wright, had been attached to the Merrimac, "the pilot was in charge of all three boats, (the two tugboats and the Merrimac,) and gave the orders," (p. 18.)

Appeal to Circuit Court; and decree there.

On an appeal to the Circuit Court, that Court, considering that the steamship Merrimac alone is liable, decreed that so far as the tow-boats, Calhoun and Harry Wright are concerned, the judgment of the District Court be affirmed, but as regards the steamship Merrimac, that the judgment be reversed. And the Circuit Court decreed that the Eclipse Tow-boat Company do recover damages from the steamship Merrimac in the sum of $4,697.49,

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and sixty feet to the eastward of the wreck-buoy. It was neither prudent nor safe to pass through the space between the Gladiator and the wreck-buoy for those three vessels that attempted to pass." "I noticed the steering of the three vessels as they approached me; did not see them take any sheer; they came in at full speed; they did not seem to deviate from the line they pursued. I observed and paid attention to their course. It was proper for the Merrimac to give two blasts of the steam-whistle to notify me that they intended to come in between the Gladiator and the wreck-buoy, but they gave me no such notice and blew no whistles." On cross-examination by the Calhoun, he says, "The Merrimac governed all the speed; she carried them along. The Calhoun had stopped before she struck the Gladiator; she wanted to let go but the speed on the three vessels was so fast that she had no chance—the three vessels being too close to us,"—She "could have cast off before she came too near." On cross-examination by the Merrimac, he says, "At a distance of about 500 feet before reaching the Gladiator, they ought to have changed their course, so as to have gone between the Carl and the buoy, but instead of this they kept right straight on to where we lay. The Calhoun had time to cut off if they had their axes ready, but she had no time to cast off. As far as I could tell, the Calhoun stopped her engines before she struck us, but her wheels were revolving at the time of collision. She may have been 120 feet from us when she stopped her engines. The engineer can stop the engines, but cannot stop the headway of his boat suddenly; even at a distance of 500 feet from us the Calhonn would have had no time to cast off." On the redirect-examination he says, "There was no room for the three vessels to pass. Had I received notice by the steam-whistle of the Merrimac that she intended to pass, although I was in my proper position, yet I would have cast off with the Celuta and gone out of the way."

with 5 per cent. interest from January 19, 1867, till paid, and costs. And as said steamship had been released from seizure and restored to the claimants, the Circuit Court further decreed that the New York Mail Steamship Company, by Wm. Creevy, their agent, claimants and owners of said steamship Merrimac as principals, and David McCoy and Creevy, Nickerson & Co., as sureties in the stipulation, be condemned *in solido* to pay said judgment, with costs.

From which decree an appeal was allowed to this Court, (p. 59. *et seq.*)

Points and authorities.

The damage is proved to have been occasioned by the mismanagement of the steamship Merrimac. *Neptune* the 2d, 1 Dodson, Adm. R., 468; 3 Kent's Com., Lect. 47, § 8, p. 230; Story on Bailm., sec. 611. With proper vigilance and precaution on the part of the officer in charge of her the collision might have been avoided. *Saune* v. *Tourne, &c.*, 9 Louis, 429. It was wrong to attempt to pass in such a way. *The Rhode Island*, 1 Blatchf., 363; *Ward* v. *Rossiter*, 6 McLean, 63; *Bestoso* v. *U. S. Mail Steamship*, 9 Louis, Ann., 268; *McCready, &c.*, v. *Goldsmith, &c.*, 18 How., 89; *Steamboat N. Y.* v. *Rea, &c.*, Id., 223; *Dunn, &c.*, v. *McComb, &c.*, 11 Louis. Ann., 325; *Green, &c.*, v. *Crou*, Id., 7; *Union Steamship* v. *N. Y. and Va. Steamship Co.*, 24 How., 314; *Steamer New Philadelphia*, 1 Black., 62. As the Merrimac was entering it was the duty of the officer in charge of her to move with great caution. He knew that the way was narrow and difficult. *The Alleghany*, 9 Wallace, 524; and it was his duty to keep the Merrimac out of the way of the Gladiator. *The Columbia*, 10 Id., 249.

II. In England, notwithstanding the pilot act of 6 Geo.

4, c. 125, it has since *Smith* v. *Condry*, 1 How., 35, 36 been settled that if the master and crew of the vessel are to blame as well as the pilot, (and of course if it is entirely their fault,) the owners are not protected by this act of Parliament. *The Netherlands Steamboat Co* v. *Styles*, 9 Moore's P. C. C., 286; 40 Eng. L. and Eq., 36. And there pilot acts are a greater protection to owners than in the United States.

In Pennsylvania, in 1800, the pilot was regarded as in the actual service of the owner of the ship, though placed in that service by the act of the legislature; and the owner of the ship was held liable for damages from the collision. *Bussy* v. *Donaldson*, 4 Dall, 206. So, after the decision of the Common Pleas of England in 1806, (*Fletcher, &c.*, v. *Brallick, &c.*, 5 Bos. & Perl., 182,) and that of the High Court of Admiralty in 1814, (*Neptune the 2d*, 1 Dodson, Adm. R., 467;) it was ruled likewise in Louisiana in 1826. *Williamson* v. *Price, &c.*, 4 Mart., N. S., 399; and in Massachusetts in 1829. It is considered that "the owners of a vessel which, by collision with another vessel, has caused damage through the fault or negligence of any one on board, is answerable to the injured party in respect of their property, notwithstanding there may be a pilot on board who has the entire control and management of the vessel;" *Parker*, C. J., saying: "It is more convenient that such owner should seek his remedy against the pilot, whom he has selected for this service, than that the injured party should; and it is more conformable to the general spirit of the law, for although the pilot holds his commission under the executive authority of the Commonwealth, yet, in many respects, he is the servant of the owner who employs him, and in regard to the time of sailing is undoubtedly under the direction of the owner." Observing that the master in such case would not be liable, (for he is

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answerable only in respect of his authority over the vessel, which authority is entirely superseded by that of the pilot when the vessel is under sail within pilot ground,") *Parker*, C. J., says, "the pilot is indeed put in the place of the master, and there is as much reason for the owner's liability in the one case as in the other." *Yates, &c.*, v. *Brown, &c.*, 8 Pick., 24. These cases are recognized in 3 Kent's Com., 176; and in 1832 there was a decision in New York in accordance therewith. *Denison* v. *Seymour*, 9 Wend. 1.

Cases under the British statutes of 52 Geo. 3, c. 39, § 30,* and 6 Geo. 4, c. 125, § 55,† have since *Smith, &c.* v. *Condry*, 1 How. 33, undergone review in the Circuit Court of the United States for Pennsylvania in a case not depending as *Smith* v. *Condry* did upon the construction of these *British* statutes; and the rule of *Bussy* v. *Donaldson* and other American cases cited in the preceding paragraph is still maintained. *Smith* v. *Creole & Sampson*, 2 Wallace, Jr., 485. The same rule was acted on in the Circuit Court of the United States for Massachusetts in 1854 in the case of *The Carolus*, 2 Curtis' C. C .R. 71. And in 1868, upon a full review of the cases, English and American, there was an authoritative, and indeed a unanimous, decision overruling the English decisions so

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*"No owner or master of any ship or vessel shall be answerable for any loss or damage, nor shall any owner or owners of any ship or vessel or consignee of goods be prevented from recovering any loss or damage upon any contract of insurance of the same or upon any other contract relating to any ship or vessel, or any cargo on board the same, for, or by reason or means of any neglect, default, incompetency or incapacity of any pilot taken on board of any such ship or vessel under or in pursuance of any of the provisions of this act."

†"No owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from or by reason or means of any neglect, default, incompetency or incapacity of any licensed pilot acting in the charge of any such ship or vessel under or in pursuance of any of the provisions of this act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof."

far as they maintain a different doctrine. *The China*, 7 Wallace, 53. As the New York pilot act did not avail in defence there, so neither can the Louisiana pilot act* avail in defense here. If in 1868 there was no adequate inducement to adopt as to this matter the policy of British statutes and the judicial conclusions thereupon, there is still less inducement to adopt the same now. Indeed, the facts of the present case indicate in a striking manner that in reference to this subject American is sounder than English jurisprudence.

III. The recovery of the sum of $4,697.49 (p. 59) will not fully indemnify for the loss sustained. *Williamson, &c.* v. *Barrett, &c.*, 13 How, 110. For the difference between that sum and the aggregate of the items proved by Perkins on page 33, and subsequent pages to 39, inclusive, appears to be less than the nett earnings of the Gladiator for the period during which she was disabled would have been. (pp. 40, 41.)

IV. A recovery is proper both against the principal and sureties in the bond or stipulation. 9 Stat. 181, § 1, 2 Brightly's Dig., p. 26, § 6.

CONWAY ROBINSON,
Counsel for Eclipse Towboat Company.

FEBRUARY, 1872.

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* The provisions in the revised statutes of Louisiana, published in 1856, (pp. 403. 404) so far as they seem pertinent, are as follows:

§ 9. It shall be the duty of the pilots to pilot, when required, all inward bound vessels from outside of what is commonly called the point of the main reef to the mouth of the Atchafalaya river, and all outward bound vessels from the said river outside of the reef; and the pilots shall be entitled to demand and receive $3.50 per foot that any vessel may draw under eight feet; for each foot over eight feet $4; the part of a foot in like proportion.

All vessels refusing a pilot, other than those trading within the State of Louisiana, shall pay half pilotage, both inward and outward bound, provided they shall be spoken by a branch pilot when inward bound, outside of the reef and all outward bound vessels between Berwick's bay and the mouth of the Atchalafaya river.

§ 19. If the master of any ship or vessel coming to the port of New Orleans shall refuse to receive on board and employ a pilot, the master or owner of such ship or vessel shall pay to such pilot who shall have offered to go on board and take charge of the vessel, half pilotage.